

## Part I - The Schedule (Continued)

## Section H - Special Contract Requirements (Continued)

**H-1 CLAUSE SUMMARY**

The following is the summary of applicable clauses incorporated in full text:

- H.1 ACCESS TO CONTRACTOR'S FACILITY
- H.2 ACCESS TO THE SHIPS
- H.3 CEREMONIES
- H.4 CONTRACT PROBLEM IDENTIFICATION REPORTS (CPIR)
- H.5 DISPOSITION OF GOVERNMENT FURNISHED EQUIPMENT/INFORMATION
- H.6 DOCUMENTATION OF REQUEST FOR EQUITABLE ADJUSTMENT
- H.7 ECONOMIC PRICE ADJUSTMENT (EPA)
- H.8 EQUITABLE ADJUSTMENTS: WAIVER AND RELEASE OF CLAIMS
- H.9 GOVERNMENT FURNISHED INFORMATION AVAILABILITY
- H.10 GOVERNMENT FURNISHED INFORMATION AND PROPERTY
- H.11 INCORPORATION OF SECTION K BY REFERENCE
- H.12 LIABILITY AND INSURANCE
- H.13 LIENS AND TITLE
- H.14 RESERVED
- H.15 PROHIBITION AGAINST FOREIGN SHIPYARDS
- H.16 PROGRESS PAYMENTS BASED ON PERCENTAGE OF PROGRESS
- H.17 RECOGNITION OF ELECTRONIC DELIVERABLES
- H.18 REQUIREMENTS FOR CONTRACTS INVOLVING EXPORT-CONTROLLED ITEMS
- H.19 RESPONSIBILITY FOR DESIGN AND CONSTRUCTION
- H.20 SMALL BUSINESS PROGRAMS
- H.21 SPECIFICATIONS AND STANDARDS
- H.22 WARRANTY IN DATA
- H.23 DEFERRED ORDERING OF TECHNICAL DATA OR COMPUTER SOFTWARE
- H.24 LIMITATIONS ON THE USE OR DISCLOSURE OF GOVERNMENT-FURNISHED INFORMATION MARKED WITH RESTRICTIVE LEGENDS)
- H.25 RIGHTS IN TECHNICAL DATA – NONCOMMERCIAL ITEMS
- H.26 RIGHTS IN NONCOMMERCIAL COMPUTER SOFTWARE AND NONCOMMERCIAL COMPUTER SOFTWARE DOCUMENTATION ( )
- H.27 TECHNICAL DATA—COMMERCIAL ITEMS
- H.28 TECHNICAL DATA OR COMPUTER SOFTWARE PREVIOUSLY DELIVERED TO THE GOVERNMENT
- H.29 TECHNICAL DATA—WITHHOLDING OF PAYMENT
- H.30 VALIDATION OF ASSERTED RESTRICTIONS—COMPUTER SOFTWARE
- H.31 VALIDATION OF RESTRICTIVE MARKINGS ON TECHNICAL DATA

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

**H.1 ACCESS TO CONTRACTOR'S FACILITY**

- a. Officers, employees and associates of other prime contractors with the Government and their subcontractors, shall, as authorized by the Contracting Officer, have at all reasonable times, admission to the contractor's facility, where and as required, and be permitted within the contractor's facility to perform and fulfill their respective obligations to the Government. The contractor shall make reasonable arrangements with the Government or contractors of the Government, as shall have been identified and authorized by the Contracting Officer, to be given admission to the contractor's facility, office space, work areas, storage or shop areas, or other facilities and services reasonable and necessary for the performance of the respective responsibilities involved.
- b. Reasonable access shall be provided to the Government to carry out its responsibilities under this contract.

**H.2 ACCESS TO THE SHIPS**

- a. Officers, employees and associates of other contractors with the Government and their subcontractors, shall, as authorized by the Government, have, at all reasonable times, admission and access to the Lead and follow hulls where and as required, and be permitted, within the plant and on the Lead and follow hulls to perform and fulfill their respective obligations to the Government. The Contractor shall make reasonable arrangements with the Government or contractors of the Government, as they shall have been identified and authorized by the Government to be given admission and access to the Lead and follow hulls for office space, work areas, storage or shop areas, or other facilities and services, necessary for the performance of the respective responsibilities involved, and reasonable to their performance.

**H.3 CEREMONIES**

- a. All ceremonies surrounding the lead or follow ships shall be conducted in accordance with COMDINST M5031.1 dated February 2010. The christening and its pre-and post ceremony activities are hosted by the Contractor. The Contractor will coordinate activities for public ceremonies for laying the keel and christening of the lead and follow ships with the Contracting Officer. The Contractor shall keep the Contracting Officer informed of all coordinated activities. Costs for ceremonies shall be borne in accordance with the Part 31 of the Federal Acquisition Regulation and COMDINST M5031.1. All reimbursable costs for ceremonies shall be coordinated with the Contracting Officer.

**H.4 CONTRACT PROBLEM IDENTIFICATION REPORTS (CPIR)**

- a. Contract Problem Identification Reports (CPIR) shall be used by the Contractor for the purposes of alerting the Coast Guard to actual or potential contract problems and for establishing an early dialogue between the Contractor and the Coast Guard with regard thereto.
- b. As used in this clause, a "contract problem" is a fact or circumstance of which the Contractor is aware that does, will, or reasonably is anticipated to:
1. have a significant or substantial impact on the delivery schedule or completion of

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

contract performance, or the cost of performance of the contract (increase or decrease), or

2. require a modification to the contract or specification(s). The terms "significant" and "substantial" shall be interpreted in the same manner as they would be interpreted by a reasonably prudent business person under the relevant circumstances.

c. The Contractor shall report each contract problem promptly, and in no event later than ten calendar days, after the Contractor identifies such contract problem. Each CPIR shall be entitled "Contract Problem Identification Report", shall be dated, numbered sequentially, and shall set forth, on the basis of the best and most complete information then known to the Contractor:

3. The nature of the contract problem;

4. The date on which the contract problem arose and the date on which the contract problem was identified as such;

5. The anticipated direct and consequential effects of the contract problem upon the delivery schedule or completion of contract performance or the cost of performance of the contract;

6. Identification of the supplies and/or services which are or may be affected; and,

7. The Contractor's plan for resolution of the contract problem, including the intended course of action to mitigate or correct the problem.

d. Follow-up status reports of each contract problem, identified by the original CPIR number, shall be furnished monthly, or more frequently as required by the Contracting Officer. A final follow-up report shall be furnished immediately following resolution of each contract problem.

e. CPIR(s) shall not be submitted when notice of the same contract problem is required to be furnished to the Coast Guard pursuant to any other clause of this contract. The submission of a CPIR, however, does not relieve the Contractor of its obligations to provide notice required under any other clause of this contract.

#### **H.5 DISPOSITION OF GOVERNMENT FURNISHED EQUIPMENT/INFORMATION**

a. Disposition instructions for the Government Furnished Equipment/Information shall be given to the Contractor no later than 60 days of the final contract deliverable acceptance.

#### **H.6 DOCUMENTATION OF REQUEST FOR EQUITABLE ADJUSTMENT**

a. For the purpose of this clause, the term "change" includes:

1. a change made pursuant to a written order designated as a "change order", or

2. any act or omission to act on the part of the Coast Guard in respect to which a request is made for equitable adjustment under FAR 52.243-1 CHANGES -- FIXED-PRICE (AUG 1987) or any other article or clause of this contract.

b. Whenever the Contractor requests or proposes an equitable adjustment of \$25,000.00 or more per ship with respect to a change made pursuant to a written order designated as a "change order" or with respect to a proposed engineering change and whenever the Contractor requests an equitable adjustment in any amount with respect to any other act or omission to act on the part of the Coast Guard, the proposal supporting such request shall contain the following information for

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

each individual item or element of the request:

1. A description of the work required by the contract before the change, which has been deleted by the change;
2. A description of the work deleted by the change which already has been completed.;
3. Description of disruption attributable solely to the change; which description shall include a description of any measures taken to lessen the disruptive effect of the change;
4. Delay in delivery attributable solely to the change;
5. Other work or increased costs attributable to the change;
6. Supplementing the foregoing, a narrative statement of the "causal" relationship between the alleged Coast Guard act or omission and the claimed consequences therefor, cross-referenced to the detailed information provided as required above;
7. It is recognized that individual claims for equitable adjustment may not include all of the factors listed in subparagraphs (1) through (7) above, or that the Contractor may not be reasonably able to furnish all of the factors listed in subparagraphs (1) through (7) above. Accordingly, the Contractor is only required to set forth in his proposal, information with respect to those factors which are relevant in the individual claims for equitable adjustment, or which he is reasonably able to furnish.

c. In addition to any information required under paragraph b., each proposal submitted in support of a claim for equitable adjustment, under any clause of this contract, of \$500,000 or more and shall contain a duly executed SF 1411 with respect to each individual claim item. The information furnished shall be in sufficient detail to permit the Contracting Officer to cross-reference the claimed increased costs, or delay in delivery, or both, as appropriate, as set forth in the SF 1411, with the information submitted pursuant to subparagraphs (b)(1) through (b)(6) hereof.

#### **H.7 ECONOMIC PRICE ADJUSTMENT (EPA)**

a. General.

1. The prices within this contract reflect price levels of the option periods identified in paragraph d below. However, because of the length of the contract, it is anticipated that the contractor's actual costs may vary from the original option prices that are part of this contract. . Adjustments due to the variation in shall be computed and effected in accordance with the procedures specified herein.

2. If exercised, all optional firm fixed priced and fixed price incentive Contract Line Items excluding profit components, are subject to economic price adjustment. If the option is exercised, economic price adjustments shall commence the first full month after exercise of option.

3. For the purpose of this clause, "Post Delivery Date" is defined as a date three months after the contractual delivery date of the CLIN as set forth in Section F clause entitled "Time of Delivery", with one exception. The "Post Delivery Date" for Warranty CLIN(s) shall be defined as the contractual end of the period of performance for those items. Also for the purpose

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

of this clause, a "monthly period" or "monthly period involved" shall mean the Contractor's normal accounting month.

b. Pricing of Changes. The costs subject to adjustment under this clause include the costs of performance of changes or other work for which the contract price is subject to equitable adjustment pursuant to the "CHANGES" clause or pursuant to other provisions of the contract. Accordingly, equitable adjustments to the contract price for the CLINs/subCLINs subject to economic price adjustment shall be determined on the basis of actual and/or projected direct material costs, direct labor costs, and indirect costs, de-escalated to price levels of the base periods identified in paragraph d below. The method of de-escalation shall be the same as that set forth in paragraph e for determining economic price adjustments.

Costs Subject to Economic Price Adjustment.

1. The intent of this clause is to provide for the monthly determination of economic price adjustments for construction of each CLIN/subCLIN, on an individual CLIN/subCLIN basis. For payment, these monthly costs shall be submitted on a quarterly basis, as described elsewhere in this clause, for development of a Supplemental Agreement. Upon execution of the Supplemental Agreement stating the amount of the economic price adjustment, the Contractor may submit an invoice for the amount (if positive), subject to the provisions of this clause. Furthermore, it is the intent of this clause to end economic price adjustment in the monthly period in which the Post Delivery Date occurs, or when the cumulative sum of the costs for the CLIN/subCLIN reaches the price set forth in the contract (procedures defined below), whichever occurs first.

2. For the purpose of this clause, the total allowable costs in the following categories shall be subject to economic price adjustment:

- (i) Selected employee benefits:
  - (A) FICA (indirect costs).
  - (B) State and Federal Workmen's Compensation (indirect costs).
  - (C) Unemployment Compensation (indirect costs).
  - (D) Disability (indirect costs).
  - (E) Federally Mandated National Health Program (indirect costs).
  - (F) Federally Mandated changes to hours of work per week or per day and changes to the payment of overtime (indirect and direct costs).
- (ii) One hundred percent of the imputed cost of facilities capital (indirect cost).
- (iii) One hundred percent of direct labor costs.
- (iv) One hundred percent of direct material costs.
- (v) Ninety-five percent of indirect costs other than indirect costs in c(2)(i), and c(2)(ii) above.

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

3. Within 30 days after the end of each quarterly period with respect to the CLIN(s)/subCLIN(s) within each CLIN, the Contractor shall submit to the Government: (i) a certified statement of the costs incurred for the CLIN(s)/subCLIN(s) within the CLINs during the three months (monthly costs) comprising the quarterly period, and (ii) a certified statement of the total cumulative costs incurred for the CLIN(s)/subCLIN(s) within the CLINs from the effective date of the contract to the end of that quarterly period (total costs). The quarterly statement shall separately identify the direct material costs, the direct labor costs, and the indirect costs for each month, and as a quarterly total. With respect to indirect costs, the statement of monthly costs shall state separately from all other indirect costs (i) the monthly incurred selected employee benefit costs of the type identified in subparagraph c(2)(i) above, (ii) the monthly imputed cost of facilities capital allocated to the CLIN/subCLIN, and (iii) the ninety-five percent of indirect costs subject to economic price adjustment. Periodic recomputation of indices may be necessary for instances as described in subparagraphs d(3) and d(4). In such cases when the applicable index for the monthly period involved has been made available or revised, the economic price adjustment for that monthly period shall be recomputed on the basis of the more recent Bureau of Labor Statistics (BLS) index, if different from the index previously used by the contractor. The contractor shall be required annually (April) to review the most recent BLS indices available and consolidate any such Economic Price Adjustment revisions. Any additional payment to or repayment by the Contractor required by the net amount of such recomputations for the period shall be reflected annually along with the Economic Price Adjustment computations submitted each April. The period for which the recomputations shall be applied is defined as the effective date of the contract to the end of the most recent month for which applicable BLS indices are available at the time of the annual review. There shall be a final recomputation submitted after the conclusion of the warranty period to adjust all revised BLS indices. The period for the final recomputation shall cover the effective date of the contract to the end of the warranty period. Submission of the final recomputation should occur within one month of the date for which applicable BLS indices covering the entire warranty period are made available to the contractor. There shall be no Economic Price Adjustment allowed nor any revisions to Economic Price Adjustment allowed for any purpose beyond the warranty period.

4. The monthly selected employee benefit costs for the CLIN/subCLIN shall be the product obtained by multiplying the yard-wide total selected employee benefit costs of the type identified in subparagraph (c)(2)(i) above by the amount of total overhead dollars, excluding the imputed cost of facilities capital, allocated to the CLIN/subCLIN for the monthly period involved and the product shall be divided by yard-wide total overhead dollars, excluding the imputed cost of facilities capital, for the monthly period involved.

5. For the purpose of this clause:

(i) "Direct material costs," "direct labor costs," and "indirect costs" shall have the meaning set forth in Section 31 of the Federal Acquisition Regulation in effect on the effective date of this contract.

(ii) "Monthly costs," and "total costs" shall include only "incurred costs" and "allowable costs" which shall also have the meaning set forth in Section 31 of the Federal Acquisition Regulation in effect on the effective date of this contract, except that "incurred costs" for material shall include the full amounts of all billings received from vendors during the monthly period involved irrespective of whether the Contractor has paid the full amount of such billings.

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

Further, on this contract, the imputed cost of facilities capital shall be treated as an "incurred indirect cost."

6. The costs identified in this paragraph c. shall be subject to audit and inspection by the Contracting Officer.

b. Cost Indices.

1. Economic Price Adjustment under paragraph e. below for selected employee benefits, imputed cost of facilities capital, 95 percent of indirect costs (other than indirect costs in subparagraph c(2)(i), and c(2)(ii) above), and direct labor costs, shall be based on changes in the Bureau of Labor Statistics Index "Labor Index of Straight-Time Average Hourly Earnings for Selected Shipyards for Steel Vessel Construction - All regions (Base: May 1987 = 100)".

2. Economic Price Adjustment under paragraph e. below for direct material costs shall be based on the changes in the Bureau of Labor Statistics Index "Material Index for Steel Vessel Contracts (Base: 1982 = 100)".

3. In the event that any of the specified indices for the monthly period involved are unavailable to the Contractor at the close of a quarterly period, economic price adjustments pursuant to this clause shall be based upon the average monthly changes in the applicable indices for the previous four (4) months for which indices are available. The average of changes so calculated shall be added to the applicable index for the immediately preceding monthly period and the sum shall constitute the index for the monthly period involved. When the applicable index for the monthly period involved has been made available, the economic price adjustment for that monthly period shall be recomputed on the basis of such index in accordance with subparagraph c(3).

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

4. In the event that any of the specified indices for any base period or any monthly period differs from the index previously available for that period, the economic price adjustment for the applicable monthly period(s) shall be recomputed on the basis of such revised index and any additional payment to or repayment by the Contractor required by such recomputation for that monthly period(s) shall be accomplished in accordance with subparagraph c(3).

5. The Contractor shall be responsible for the calculations involving indices provided for in this paragraph, and said calculations shall be subject to verification and audit by the Government.

6. For the purpose of computing economic price adjustments under this clause, the base period index values (subject to adjustment as specified in subparagraph d(4) above) are those final published values for August, 2001.

7. In the event that the Bureau of Labor Statistics discontinues determining the index cited herein, the Producer Price Index as published by the Department of Labor shall become the substitute for the discontinued index, unless the parties mutually agree upon another index.

8. In the event that the Bureau of Labor Statistics alters its methods of calculating the index cited herein (including a change in the base period), appropriate adjustments in the affected index shall be agreed upon by the parties, to put it on a comparable basis with the index as calculated before the change.

9. In the event that the Bureau of Labor Statistics changes its method of publication of the index cited herein, but does not change its method of computing the index, the contracting officer will notify the contractor of the revised method of publication. A change in agency responsibility for this index shall be considered to be a change in method of publication, and not a change in the method of computation.

c. Computation of Economic Price Adjustment.

1. For the purpose of computing economic price adjustments under this clause, the following computations shall be used for all the categories of cost specified in subparagraph c(2). For each monthly period commencing prior to the Post Delivery Date of the CLIN/subCLIN, the amount of the applicable category of cost for the CLIN/subCLIN certified on the quarterly statement of monthly costs for that monthly period shall be multiplied by the difference between the value of the applicable index for that monthly period and the applicable base period index described in subparagraph d(6) above, and the product thereof shall be divided by the value of the applicable index for that monthly period and the result, the economic price adjustment for the applicable category of cost, shall be expressed to the nearest dollar. The calculation is as follows:

$$\frac{\begin{array}{l} \text{(Current} \quad \text{Base )} \\ \text{(Month} \quad \text{- Period)} \\ \text{(Index} \quad \text{Index )} \end{array} \times \begin{array}{l} \text{Current} \\ \text{Month} \\ \text{Cost} \end{array}}{\text{Current Month Index}} = \text{Economic Price Adjustment}$$

2. For any monthly period commencing subsequent to the Post Delivery Date of the CLIN/subCLIN, there shall be no economic price adjustment. In the event and to the extent that the contract delivery date for the CLIN/subCLIN is subsequently extended by contract modification, the Post Delivery Date for the CLIN/subCLIN shall be extended on a day-for-day



Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

basis. The Contractor shall submit such documentation necessary, in the same format as described herein, to be compensated for such extension of the CLIN/subCLIN contract delivery date.

3. For each monthly period commencing prior to the contractual delivery date of the CLIN(s)/subCLIN(s), the economic price adjustments computed above for all categories of cost for the CLIN(s)/subCLIN(s) shall be totaled and subtracted from the Total Monthly Cost for the CLIN/subCLIN, and the resulting difference shall constitute the Base Cost for the CLIN/subCLIN for that monthly period. No adjustment for economic price adjustment under this clause shall be made in the event that the cumulative sum of the "Base Costs" of the CLIN/subCLIN for all preceding monthly periods exceeds the price set forth in the contract; provided, further, that in the event the contract price thereafter is increased by modification to this contract, adjustment for economic price adjustment under this clause shall be made for each monthly period that the cumulative sum of the Base Costs for the vessel for all preceding monthly periods does not exceed such increased contract price.

4. No adjustment for economic price adjustment under this clause shall be made for any monthly period for any CLIN(s)/subCLIN(s) in the event that the specified indices for the monthly period involved are unavailable solely as a result of the failure by the Contractor to submit timely, accurate, and complete information to the BLS necessary for their calculation of the indices. Any amount withheld under the provisions of this paragraph shall be released following the Contractor's submission of such information.

5. The amount of adjustment in compensation for the CLIN(s)/subCLIN(s) determined as above (plus or minus) shall be set forth separately in a Supplemental Agreement to this contract, which also shall set forth the computation upon which each adjustment in compensation is based. The separate CLIN(s) established in the contract are for purposes of recording the initial and subsequent Supplemental Agreements. The Government also reserves the right to obligate advance amounts for payment of economic price adjustments, without regard to the cumulative sum of previous Supplemental Agreements, in order to satisfy budgetary constraints.

6. In the event that any amount shown in any Supplemental Agreement pursuant to paragraph e in respect to the CLIN/subCLIN is a minus figure, such amount shall be deducted from any invoice(s) presented for payment under any requirement of this contract until such amount has been offset or recouped in full.

d. Payment of Economic Price Adjustment.

1. Payments of amounts of economic price adjustment under this clause shall be made for the CLIN(s)/subCLIN(s) on the basis of monthly periods submitted by quarters. After execution of the Supplemental Agreement pursuant to paragraph e of this clause in respect of a quarterly period, and upon submission of a proper invoice, the Contractor shall be paid or there shall be deducted for the CLIN(s)/subCLIN(s) the amount set forth in such Supplemental Agreement, subject to the limitations contained in paragraph f(2), and/or elsewhere in this contract.

2. Payments under this clause shall be 100 percent of the amount stated in the Supplemental Agreement determined above. After the close of the monthly period during which the CLIN/subCLIN is actually delivered, any remaining deferred payments for economic price

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

adjustment shall, upon submission of proper invoices by the Contractor and upon verification thereof by the Contracting Officer, be promptly paid.

e. No adjustment shall be made in the Target Cost, Target Profit, Target Price or Ceiling Price on account of upwards or downwards adjustments made in accordance with this clause, and hence said adjustments will be paid separately and are outside the incentive price revision formula provided for in the Section I clause entitled "Incentive Price Revision – Firm Target."

f. To facilitate budgeting forecasts the Contractor shall, 15 days after the end of each monthly period, separately submit draft computations for the economic price adjustment for that monthly period. These draft computations are not binding, nor need to be recalculated as described elsewhere in this clause, and shall only be used for the purpose described in this paragraph g.

g. Any dispute arising under this clause shall be determined in accordance with and subject to the requirement of the Section I clause entitled "DISPUTES".

#### **H.8 EQUITABLE ADJUSTMENTS: WAIVER AND RELEASE OF CLAIMS**

a. Whenever the Contractor, after receipt of a change made pursuant to the Section I FAR clause 52.243-1, titled "CHANGES--FIXED-PRICE", submits any claim for equitable adjustment, such claim shall include all types of adjustments in the total amounts to which the contract entitles the Contractor, including but not limited to adjustments arising out of delays or disruptions or both caused by such change.

b. Further, the Contractor agrees (except as the parties may otherwise agree) that, if required by the Contracting Officer, he will execute a release, in form and substance satisfactory to the Contracting Officer, as part of the supplemental agreement setting forth the aforesaid equitable adjustment, and that such release shall discharge the Coast Guard, its officers, agents and employees, from any further claims including but not limited to further claims arising out of delays or disruptions or both, caused by the aforesaid change.

#### **H.9 GOVERNMENT FURNISHED INFORMATION AVAILABILITY**

a. All the data or information which the government has provided or will provide to the Contractor is set forth in Section J attachment 11 entitled "Government Furnished Information."

b. The Contractor shall submit to the Contracting Officer a GFI Deficiency Report, for GFI listed in Attachment 11, within ten (10) days of:

1. Initial receipt, inspection and discovery of any patent defect or other significant problem which renders any item of data unsuitable for use.

2. Discovery that the data contained latent defects that may have existed at the time of delivery but could not reasonably have been discovered until the actual attempted use of the data.

3. The end of the month in which data was scheduled for delivery but has not been received.

c. The Contracting Officer may at any time by written order:

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

1. delete, supersede, or revise, in whole or in part, data listed or specifically referenced in Attachment 11; or
  2. add items of data or information to Attachment 11 or
  3. revise due dates for items of data or information referenced in Attachment 11.
- c. If either (1) any action taken by the Contracting Officer pursuant to paragraph c., or (2) any such deficiency as reported pursuant to paragraph b. causes an increase or decrease in the costs of or the time required for performance of any part of the work under this contract, any equitable adjustment shall be made in the contract price and delivery schedule in accordance with the procedures provided for in the clause of this contract entitled "Changes".
- d. The provisions of this clause state the sole and exclusive liability of the Government to the Contractor for adjustment of the contract price and/or delivery schedule for performance of any part of the work under this contract incident to, arising out of, or resulting from Government Furnished Information, and the Government shall not be liable to suit for breach of contract on account thereof.

#### **H.10 GOVERNMENT FURNISHED INFORMATION AND PROPERTY**

- a. The Government will provide only that information and property set forth in Section J, Attachments 9 and 11, notwithstanding any term or condition of the specification(s) to the contrary. All property provided to Contractor by the Government under this contract shall be subject to Section I, FAR clause 52.245-2, "Government Property-Fixed Price Contracts" and the Department of Transportation Regulations 1245.5, Management of Government Property in the Possession of Contractors.

#### **H.11 INCORPORATION OF SECTION K BY REFERENCE**

- a. In accordance with FAR 15.406-1(b), Part IV of the Uniform Contract Format shall not be physically included in the contract, but Section K, Representations, Certifications, and Other Statements of offerors (as completed by the contractor) shall be deemed incorporated by reference in the contract.

#### **H.12 LIABILITY AND INSURANCE**

- a. The Contractor shall exercise reasonable care and use its best efforts to prevent accidents, injury or damage to all employees, persons and property, in and about the work, and to the OPC(s) or parts thereof upon which work is done. Notwithstanding this clause, the Government does not assume any risk with respect to, and will not pay for any costs of the Contractor for the inspection, repair, replacement, or correction of any defects in the OPC(s) or such materials and equipment for which the Contractor is responsible, in accordance with the clauses of the modification concerning quality assurance, warranty or inspection.
- b. The Contractor shall not, unless otherwise directed or approved in writing by the Contracting Officer, carry or incur the expense of any insurance against any form of loss or damage to the OPC(s) or to the materials or equipment therefore to which the Government has title or which have been furnished by the Government for installation by the Contractor. The Government assumes the risks of loss of and damage to the OPC(s) and such materials and equipment which would have been assumed by the underwriters if the Contractor had procured and maintained

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

throughout the term of this contract, on behalf of itself and the Government, insurance with respect to the OPC(s) and such materials and equipment for full value against pre-keel and post-keel laying risks which would have been customarily carried by the Contractor in the absence of the foregoing requirement that the Contractor not carry or incur the expense of insurance. The foregoing assumption of risk is by the Contractor only. Except as expressly provided by the Contracting Officer, the Government does not assume liability for materials while in the possession or control of any other Contractor, subcontractor, or other third parties. The Government does not assume any risk with respect to loss or damage compensated for by insurance or otherwise or resulting from risks with respect to which the Contractor has failed to procure or maintain insurance, if available, as required or approved by the Contracting Officer; provided, further, that under this clause the Government does not assume any risk with respect to, and will not pay for any costs of the Contractor for the inspection, repair, replacement or renewal of any defects themselves in the OPC(s) or materials or equipment performed by or furnished by the Contractor or its subcontractors which do(es) not conform to the requirements of the contract, whether or not any such defect is latent or whether or not any such nonconformance is the result of negligence; provided, further, that under this clause the Government does not assume the risk of and will not pay for the costs of any loss, damage, liability or expense caused by, resulting from, or incurred as a consequence of delay or disruption of any type whatsoever; or willful misconduct or lack of good faith on the part of any of the Contractor's managers, superintendents or other equivalent representatives who have supervision or direction of (i) all or substantially all of the Contractor's business, (ii) all or substantially all of the Contractor's operation at any one plant or (iii) a separate and complete major industrial operation connected with the performance of a provisioned order (Lack of good faith is presumed where management has been notified of any unsafe condition or practice contrary to the Fire, Flooding and Destructive Weather Plans, corrective action has been agreed to by management or directed by the Contracting Officer, corrective action is not taken after a reasonable time, and such unsafe condition or practice materially contributes to either the cause of the fire or the extent of the damage); provided, however, that as to such risk assumed and borne by the Government, the Government will be subrogated to any claim, demand or cause of action against third persons which exists in favor of the Contractor, and the Contractor shall, if required, execute a formal assignment or a transfer of claims, demands or causes of action; provided, further, that nothing contained in this paragraph shall create or give rise to any right, privilege or power in any person except the Contractor, nor shall any person (except the Contractor) be or become entitled thereby to proceed directly against the Government, or join the Government as codefendant in any action against the Contractor's liability or for any other purpose. Notwithstanding the foregoing, the Contractor shall bear the first \$30,000 deductible of loss or damage for each occurrence or incident the risk of which the Government otherwise would have assumed under the provisions of this paragraph.

(c) The Contractor indemnifies and holds harmless the Government, its agencies and instrumentalities, against all suits, actions, claims, costs or demands, (including, without limitation, suits, actions, claims, costs or demands resulting from death, personal injury, and property damage) to which the Government, its agencies and instrumentalities, may be subject or put by reason of damage or injury (including death) to the property or person of any one other than the Government, its agencies, instrumentalities and personnel, arising or resulting in whole or in part from the fault, negligence, wrongful act or wrongful omission of the Contractor, or any subcontractor, or their servants, agents or employees; provided, that the Contractor's obligation to

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

indemnify under this paragraph (c) shall not exceed the sum of \$300,000.00 on account of any one accident or occurrence in respect of any one ship. Such indemnity shall include, without limitation, suits, actions, claims, costs or demands of any kind whatsoever, resulting from death, personal injury or property damage occurring during the period of performance; and with respect to any such suits, actions, claims, costs, or demands resulting from death, personal injury or property damage occurring after the expiration of such period, the rights and liabilities of the Government and the Contractor shall be as determined by other provisions of the modification and by law; provided, however, that such indemnity shall apply to death occurring after such period which results from any personal injury received during the period covered by the Contractor's indemnity as provided herein.

(d) The Contractor shall procure, and thereafter maintain such casualty, accident and liability insurance, in such forms and amounts as may be approved by the Contracting Officer, further, the Contractor shall procure and maintain in force Workmen's Compensation Insurance (or its equivalent) covering their employees engaged on the work and shall insure the procurement and maintenance of such insurance by all subcontractors engaged on the work. The Contractor shall provide such evidence of such insurance as may be, from time to time, required by the Government. All such insurance which is or may be required or approved pursuant to this clause shall be in such form, in such amounts, for such periods of time, and with such insurer's having an A.M. Best Rating of A-, VII or provided the Contractor shall be named as an insured and shall be entitled to payment of any loss or damage as its interest may appear.

(e) No allowance shall be made to the Contractor in the modification price for the inclusion of any premium expense or charge for any reserve made on account of self insurance for coverage against any risk assumed by the Government under this clause. The cost of the insurance required by paragraph (d) of this clause is included in the price and the cost of all other insurance, which may be required or approved pursuant to this clause, will be considered allowable costs under this contract. If the Contracting Officer should require or approve the cancellation of any such insurance, the Contractor shall promptly pay to the Government the amount of all unearned premiums refunded to the Contractor, but only to the extent that such premiums shall have been reimbursed to the Contractor by the Government or included in the modification price.

(f) As soon as practicable after the occurrence of any loss or damage the risk of which the Government has assumed, written notice of such loss or damage shall be given by the Contractor to the Contracting Officer. This notice shall contain full particulars of such loss or damage. If claim is made or suit is brought thereafter against the Contractor as a result or because of such event, the Contractor shall immediately deliver to the Government every demand, notice, summons or other process received by itself or its representatives. The Contractor shall cooperate with the Government and, upon the Government's request, shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits; and the Government may pay to the Contractor the expense, other than the cost of maintaining the Contractor's usual organization, incurred in so doing. The Contractor shall not, except at its own cost, voluntarily make any payment, assume any obligation, or incur any expense other than shall be imperative for the protection of the OPC(s) at the time of said occurrence of such event.

(g) In the event of loss of or damage to any of the OPC(s) or any of the materials or equipment

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

therefore which may result in a claim against the Government under the insurance provisions of this contract, the Contractor shall promptly notify the Contracting Officer of such loss or damages, and the Contracting Officer may, without prejudice to any other right of the Government either:

(1) Order the Contractor to proceed with replacement or repair in which event the Contractor shall effect such replacement or repair. The Contractor shall submit to the Contracting Officer a request for the cost of such replacement or repair together with such supporting documentation as the Contracting Officer may reasonably require, and shall identify such requests as being submitted under the "Insurance" Clause of this contract. If the Government determines that the risk of such loss or damages is within the scope of the risks assumed by the Government under this clause, the Government will reimburse the Contractor for the reasonable, allowable cost of such replacement or repair, plus a reasonable profit (if the work of replacement or repair was performed by the Contractor) less the deductible amount as specified in paragraph (b) of this clause. Payments by the Government to the Contractor under this Insurance clause are outside the scope and shall not affect the pricing structure of the contract, and are additional to the compensation otherwise payable to the Contractor under this contract; or

(2) In the event the Contracting Officer decides that the loss or damage shall not be replaced or repaired, (i) modify the modification appropriately consistent with the reduced requirements reflected by the un-replaced or unrepaired loss or damage, or (ii) terminate under the Section I clause of the contract entitled "Termination for Convenience of the Government (Fixed-Price)."

### **H.13 LIENS AND TITLE**

a. Any and all payments made hereunder on account of an OPC(s) and the materials and equipment therefore shall be secured, when made, by a lien in favor of the Government upon such material and equipment on account of all payments so made, except to the extent that the Government, by virtue of any other provision of this contract, or otherwise, shall have valid title to such material and equipment as against other creditors of the Contractor. If such property is not identified by marking or segregating the Government shall be deemed to have a lien upon a proportionate part of any mass of property with which such property is commingled. Any lien provided for by virtue of this clause is paramount to all other liens. Upon completion and delivery of an asset, said lien shall be discharged as to any materials and equipment which have not been included in the asset and which are no longer required therefore.

b. Title to the OPC(s) under construction shall be vested in the Government and title to all materials and equipment acquired for each OPC shall vest in the Government upon delivery thereof to the plant of the Contractor, provided, that the Contracting Officer may, by written direction, require that title shall vest in the Government upon delivery of such materials and equipment to the carrier for transportation to the plant of the Contractor. The amount of any freight charges, transportation, taxes or other costs which would have been paid by the Contractor, either directly or as an element of any subcontract cost, and which the Contractor shall not be required to pay as a result of such earlier vesting of title and any use of Government bills of lading, shall be determined and treated as though resulting from a change order and the contract price reduced accordingly. Upon completion of the OPC(s), or with the approval of the

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

Contracting Officer at any time during the construction/conversion of the OPC(s), all such materials and equipment which have not been included therein and which are agreed between the Contractor and the Contracting Officer to be no longer required therefore, except materials and equipment which were furnished by the Government or the cost of which has been reimbursed by the Government to the Contractor, shall become the property of the Contractor; provided, however, that models, mock-ups, plans and other items which the Contractor is expressly required to construct, prepare, or furnish shall remain the property of the Government. Upon completion of this contract, or at such earlier date as may be fixed by the Contracting Officer, the Contractor shall submit, in a form acceptable to the Contracting Officer, inventory schedules covering all items of property not consumed in the performance of this contract (including any resulting scrap) or not theretofore delivered to the Government, the cost of which has been reimbursed by the Government to the Contractor apart from the fixed price. The Contractor shall deliver or make such other disposal of such property as may be directed or authorized by the Contracting Officer. Recoverable scrap from such property shall be reported in accordance with such procedure in accordance with a Government approved Contractor scrap procedure. The net proceeds of any such disposal shall be credited to the Government and shall be paid in such manner as the Contracting Officer may direct. For the purpose of this clause, "net proceeds" means actual amount collected from such sale of disposal less sales, collection fees and other reasonable related expenses.

c. The rights and remedies provided in this clause are in addition to and do not limit any right and remedies provided to the Government by law or by any other clause of this contract.

#### **H.14 RESERVED**

#### **H.15 PROHIBITION AGAINST FOREIGN SHIPYARDS**

a. In accordance with 14 U. S. C. 665, the ship, including major components of the hull or superstructure, required by the contract may not be constructed in a foreign shipyard.

#### **H.16 PROGRESS PAYMENTS BASED ON PERCENTAGE OF PROGRESS**

##### **(a) Computation of Payments**

(1) Until such time as physical progress in the performance of work on a vessel is 50% complete as demonstrated by the Performance Measurement Baseline (PMB), the Government, upon submission by the Contractor of invoices certified by the Contractor as hereinafter provided, will promptly make payments, on account of the total contract price(s), at ninety percent (90%) of the amount determined by multiplying the allocated total contract price of such vessel by the percentage of physical progress in the performance of work on such vessel as certified by the Contractor subject to the approval of the Contracting Officer; provided, that no such payment shall be made in an amount which when added to the total of all payments previously made with respect to such vessel under paragraph (a) of this clause exceeds one hundred percent (100%) of the allowable costs certified by the Contractor on the related invoice to have been incurred in the performance of work on such vessel.

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

(2) After the percentage of physical progress in the performance of work on a vessel has reached fifty percent (50%) as demonstrated by the PMB, the Government, upon submission by the Contractor of invoices certified by the Contractor as hereinafter provided, will promptly make payments, on account of the total contract price(s), at one hundred percent (100%) of the amount determined by (i) multiplying the allocated total contract price of such vessel by the percentage of physical progress in the performance of work on such vessel as certified by the Contractor subject to the approval of the Contracting Officer, and (ii) subtracting from that product five percent (5%) of the allocated total contract price of such vessel; provided, that no such payment shall be made in an amount which when added to the total of all payments previously made with respect to such vessel under paragraph (a) of this clause exceeds one hundred percent (100%) of the allowable costs certified by the Contractor on the related invoice to have been incurred in the performance of work on such vessel; provided, further, that the Contractor furnishes data on actual cumulative costs and estimated future costs acceptable to the Contracting Officer which demonstrates to the satisfaction of the Contracting Officer that the Contractor will make a profit of at least five percent (5%) on completion of the contract, and the Contractor provides updated information on a quarterly basis. If updated data indicate the Contractor will not make a profit of at least five percent (5%) on completion of the contract, the progress payments shall be adjusted retroactively so that the total of all payments made with respect to that vessel under paragraph (a) of this requirement shall not exceed one hundred percent (100%) of the allowable costs certified by the Contractor on the related invoice to have been incurred in the performance of work on such vessel.

(3) For the purpose of this clause, any amount earned based on the percentage of physical completion times contract price but not paid is defined as "retentions" for the purposes of (4) above.

(b) Billing Price

(1) For the purpose of this requirement, until the establishment of the total final price(s) in accordance with paragraph (d) of the clause of this contract entitled "Incentive Price Revision-- Firm Target" (FAR 52.216-16), the term "total contract price" means the billing price; initially the billing price shall be the initial total contract target price(s), and thereafter the billing price shall be revised as provided in paragraph (b)(2) below. After establishment of the total final price(s) in accordance with paragraph (d) of the "Incentive Price Revision (Firm Target)" clause, the billing price shall be the total final price(s) so established.

(2) Within fifteen (15) days after each calendar quarter the Contractor may submit in writing a proposed revised billing price which shall be established as follows:

(i) The Contractor shall certify to the Contracting Officer the percentage of physical progress in the performance of the contract as a whole as of the end of the calendar quarter. Such percentage of physical progress shall be expressed as a decimal carried to four decimal places and shall be subject to the approval of the Contracting Officer.

(ii) The revised billing price shall be the sum of a projected final cost(s), and a projected profit, computed as follows:



## Part I - The Schedule (Continued)

## Section H - Special Contract Requirements (Continued)

(A) A projected final cost shall be computed by (i) determining the cumulative sum of the base costs as of the end of the calendar quarter, and (ii) dividing the sum thereof by the percentage of physical progress certified and approved as set forth in subparagraph (i) above.

(B) A projected profit shall be determined by applying to the projected final cost(s) the incentive formula set forth in paragraph (d)(2) of the "Incentive Price Revision--Firm Target" clause; provided, that in no event shall the revised billing price exceed the ceiling price(s) of the contract.

(iii) The revised billing price determined as stated above shall be set forth separately in a supplemental agreement to this contract, which also shall set forth the computations upon which the revision of the billing price is based.

(iv) Any revision of the billing prices shall not affect the determination of the total final price(s) under paragraph (d) of the "Incentive Price Revision--Firm Target" clause. After execution of the contract modification referred to in subparagraph (d)(3) of said clause, the total amount paid or to be paid on all invoices or vouchers shall be adjusted to reflect the total final price(s), and any additional payments, refunds, or credits resulting therefrom shall be promptly made.

(c) Invoices. Invoices may be submitted monthly, but not more frequently; provided, however, that if after contract award more frequent progress payments are approved by cognizant Government authority, this requirement shall be modified accordingly without additional consideration by the Contractor to the Government for such modification. No payment will be required to be made upon invoices aggregating less than five thousand dollars (\$5,000). The Contractor shall certify on each invoice:

(1) the percentage of physical progress in the performance of work on the vessel as a decimal carried to four places; and

(2) the allowable costs incurred in the performance of the work on the vessel as of the date the invoice is submitted. Such certification shall provide for cost category reporting in accordance with the Contractor's normal accounting system and shall be broken down into direct material, direct labor, and indirect costs.

(d) Physical Progressing System. Within sixty (60) days after contract award the Contractor shall submit a progressing system description for review and approval by the Contracting Officer. Upon approval of such system, progress payments shall be in accordance with the approved system. Subsequent revisions to the approved system shall be submitted to the Contracting Officer for approval prior to implementation.

(e) Incurred Costs. For the purpose of this clause, "incurred costs" are those costs identified through the use of the accrual method of accounting, as supported by the records maintained by the Contractor and which are allowable in accordance with Part 31 of the Federal Acquisition Regulation (FAR) and Part 3031 of the Department of Homeland Security Acquisition Regulation and include only:

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

(1) Costs for items or services purchased directly for the contract which are paid as well as incurred, as shown by payment made by cash, check, or other form of actual payment; and

(2) Costs incurred, but not necessarily paid, for materials issued from the Contractor's stores inventory and placed in the production process for use on the contract, for direct labor, for direct travel, for other direct in-house costs and for properly allocable and allowable overhead (indirect) costs, all as shown by records maintained by the Contractor for the purpose of obtaining payment under Government contracts, provided that the Contractor is not delinquent in payment of costs of contract performance in the ordinary course of business; and

(3) With respect to allocated and allowable costs of pension contributions, when pension contributions are paid by the Contractor to the retirement fund less frequently than quarterly, accruals of the costs of these pension contributions shall be excluded from the Contractor's incurred costs until such costs are paid. If pension contributions are paid on a quarterly or more frequent basis, accruals of such costs may be included in the Contractor's incurred costs, provided that the pension contributions are paid to the retirement fund within thirty (30) days after the close of the period covered by payment. If payments are not paid within such thirty (30) day period, pension contributions shall be excluded from the Contractor's incurred costs until payment therefore has been made.

(4) Incurred costs shall not include any costs which are required under any requirement of this contract to be reimbursed or paid by the Government to the Contractor or by the Contractor to the Government other than through an equitable adjustment in the contract price(s).

(5) If an overpayment is made relative to this paragraph (e), interest shall be charged at the prevailing per annum rate established by the Secretary of the Treasury, pursuant to Public Law 92-41, from the date such overpayment is made (date of Government check) until the date the overpayment is fully recovered.

(f) Retentions

(1) Upon acceptance of each ship and upon the submission of properly certified invoices, the Government will pay to the Contractor the amount withheld under paragraph (a) of this requirement in respect of that vessel in excess of (i) a performance reserve in the amount of one and one-half percent (1.5%) of the allocated total contract price for such vessel, or (ii) one hundred thousand dollars (\$100,000), whichever is greater. If at any time it shall appear to the Government that the amount of performance reserve may be insufficient to meet the cost to the Government of finishing any unfinished work under the contract for which the Contractor is responsible, or of correcting defects for which the Contractor is responsible which are discovered prior to preliminary acceptance or during the warranty period of any vessel, the Government may, in making payments under this requirement, deduct or withhold such additional amounts as it may determine to be necessary to render such reserve adequate; provided, that any additional amounts deducted or withheld on account of defects which are discovered during the warranty period of the vessel shall not exceed the limit of the Contractor's liability as set forth in the requirement entitled "Limitation Of Contractor's Liability For Correction Of Defects", reduced by the amounts of the cost incurred by the Contractor for work on such vessel because of Contractor responsible deficiencies which are discovered during the guaranty period of the vessel.

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

(2) The Government may, in its discretion, make payments prior to final settlement on account of the reserves established under this requirement, subject to such conditions precedent as the Contracting Officer may prescribe.

(3) The Government shall, at the time of final settlement, in accordance with the provisions of the requirement entitled "Final Settlement", pay the Contractor the balance owing to it under the contract promptly after the amount of such balance shall have been determined.

(i) **Certifications and Audits.** At any time or times prior to final payment under this contract, the Contracting Officer may have any invoices and statements or certifications of costs or percentage of completion audited. The Contracting Officer may require the Contractor to submit, or make available for examination by the Contracting Officer or his designated representative, the supporting documentation upon which invoices, statements or certifications of costs or percentage of completion are based. Each payment theretofore made shall be subject to reduction as necessary to reflect the exclusion of amounts included in the invoices or statements or certifications of costs or percentage of completion which are found by the Contracting Officer, on the basis of such audit, not to constitute allowable costs. Any payment may be reduced for overpayments, or increased for underpayments on preceding invoices.

#### **H.17 RECOGNITION OF ELECTRONIC DELIVERABLES**

a. Data required to be delivered under the ELIN of the contract, that would be deemed technical data under the clause, Rights in Technical Data – Noncommercial Items if it were delivered in written form, shall not lose its status as technical data because access by the Government, or delivery by the Contractor, is by electronic means. The rights of the parties in said technical data shall be as specified in the clause Rights in Technical Data – Noncommercial Items.

#### **H.18 REQUIREMENTS FOR CONTRACTS INVOLVING EXPORT-CONTROLLED ITEMS**

(a) *Definition.* "Export-controlled items," as used in this clause, means items subject to the Export Administration Regulations (EAR) (15 CFR Parts 730-774) or the International Traffic in Arms Regulations (ITAR)(22 CFR Parts 120-130). The term includes:

(1) "Defense items," defined in the Arms Export Control Act, 22 U.S.C. 2778(j)(4)(A), as defense articles, defense services, and related technical data, and further defined in the ITAR, 22 CFR Part 120.

(2) "Items," defined in the EAR as "commodities", "software", and "technology", terms that are also defined in the EAR, 15 CFR 772.1.

(b) The Contractor shall comply with all applicable laws and regulations regarding export-controlled items, including, but not limited to, the requirement for contractors to register with the Department of State in accordance with the ITAR. The Contractor shall consult with the Department of State regarding any questions relating to compliance with the ITAR and shall consult with the Department of Commerce regarding any questions relating to compliance with the EAR.

## Part I - The Schedule (Continued)

## Section H - Special Contract Requirements (Continued)

(c) The Contractor's responsibility to comply with all applicable laws and regulations regarding export-controlled items exists independent of, and is not established or limited by, the information provided by this clause.

(d) Nothing in the terms of this contract adds, changes, supersedes, or waives any of the requirements of applicable Federal laws, Executive orders, and regulations, including but not limited to—

- (1) The Export Administration Act of 1979, as amended (50 U.S.C. App. 2401, et seq.);
- (2) The Arms Export Control Act of 1976 (22 U.S.C. 2751, et seq.); *et seq.*;
- (3) The International Emergency Economic Powers Act (50 U.S.C. 1701, et seq.);
- (4) The Export Administration Regulations (15 CFR Parts 730-774);
- (5) The International Traffic in Arms Regulations (22 CFR Parts 120-130); and
- (6) Executive Order 13222, as extended;

(e) Data delivered under this contract that contain technical data are subject to the restrictions of the Arms Export Control Act (Title 22, U. S. C., Section 2751). Technical documents shall be marked with the appropriate ITAR Control Statements

(f) The Contractor shall include the substance of this clause, including this paragraph (f), in all subcontracts.

(End of clause)

## **H.19 RESPONSIBILITY FOR DESIGN AND CONSTRUCTION**

a. In as much as functional design and technical specification are prepared and developed by the Contractor, the Contractor assumes the responsibility for the completeness, thoroughness, and adequacy for designing and constructing the OPC meeting the requirements contained in the system specification. In the event there are any errors or omissions in the technical specifications, or in the accompanying plans that affect the detail design and construction of the OPC, the Contractor shall correct such errors or omissions as a part of the work up to final acceptance with no increase in price or schedule. Any inquiries or comments made or not made by the Coast Guard in its review/evaluation of the Contractor's data deliverables shall not relieve the Contractor of the responsibilities prescribed above.

## **H.20 SMALL BUSINESS PROGRAMS**

a. The Contractor shall comply with the Electronic Subcontracting Reporting System (eSRS) found at [www.esrs.gov](http://www.esrs.gov) which provides for electronic reporting to substitute for the SF 294 and SF 295.

## **H.21 SPECIFICATIONS AND STANDARDS**

a. In the event there are conflicts, inconsistencies or gaps among these standards and specifications, the Contractor shall promptly notify the Contracting Officer upon discovery of such

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

issues for clarification or resolution. The Contractor shall diligently continue performance of this contract to the maximum extent possible in accordance with its terms and conditions as construed by the Contractor until the clarification/decision is received from the Contracting Officer.

**Definition:** A “first-tier reference” is either: (1) a specification, standard, or drawing that is cited in the contract (including attachments), or (2) the drawings or standards listed in this clause. A “second-tier reference” is either: (1) a specification, standard, or drawing cited in a first-tier reference, or (2) a specification cited in a first-tier drawing.

b. All first-tier and first-tier references are mandatory for use. All lower tier references in the specifications and standards shall be used for guidance only. All tiers of reference in non-Government standards are mandatory for use. This applies to military specifications and standards that are lower-tier references in the cited non-Government standards.

c. If, during the performance of this contract, the Contractor believes that outdated or different versions of any specifications or standards exists, the Contractor may request that the contract be updated to include the current version of the applicable specification or standard. Updating shall not affect the form, fit, or function of any deliverable item or increase the cost/price of the item to the Government. The Contractor may elect to submit update requests to the Contracting Officer for approval. The Contractor shall perform in accordance with the existing specifications and standards until notified of approval/disapproval by the Contracting Officer. Any approved alternate specifications or standards will be incorporated into the contract.

## **H.22 WARRANTY OF DATA**

a. Notwithstanding inspection and acceptance by the Government of technical data furnished under this contract, and notwithstanding any provision of this contract concerning the conclusiveness of acceptance, the Contractor warrants that all technical data delivered under this contract will at the time of delivery conform with the specifications and all other requirements of this contract. The warranty period shall extend for three years after completion of the delivery of the line item of data (as identified in DD Form 1423, Contract Data Requirements List) of which the data forms a part; or any longer period specified in the contract.

b. The Contractor agrees to notify the Contracting Officer in writing immediately of any breach of the above warranty which the Contractor discovers within the warranty period.

c. The following remedies shall apply to all breaches of the warranty, whether the Contractor notifies the Contracting Officer or if the Government notifies the Contractor of the breach in writing within the warranty period:

(1) By written notice the Contracting Officer may direct the Contractor to correct or replace at the Contractor's expense the nonconforming technical data promptly; or if the Contracting Officer determines that the Government no longer has a requirement for correction or replacement of the data, or that the data can be more reasonably corrected by the Government, inform the Contractor by written notice that the Government elects a price or fee adjustment instead of correction or replacement.

## Part I - The Schedule (Continued)

## Section H - Special Contract Requirements (Continued)

d. If the Contractor refuses or fails to comply with a direction under this clause the Contracting Officer may direct by contract or otherwise, correct or replace the nonconforming technical data and charge the cost to the Contractor; or elect a price or fee adjustment instead of correction or replacement

(End of clause)

### **H-23 DEFERRED ORDERING OF TECHNICAL DATA OR COMPUTER SOFTWARE**

In addition to technical data or computer software that is already subject to a contract delivery requirement, the United States may require at any time the delivery of technical data that has been generated or utilized in the performance of a contract, and compensate the contractor only for reasonable costs incurred for converting and delivering the data in the required form, upon a determination that—

(A) the technical data is needed for the purpose of reprocurement, sustainment, modification, or upgrade (including through competitive means) of a major system or subsystem thereof, a weapon system or subsystem thereof, or any noncommercial item or process; and

(B) the technical data—

- (i) pertains to an item or process developed in whole or in part with Federal funds; or
- (ii) is necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes, and.

Provided that the United States is not foreclosed from requiring the delivery of the technical data by a failure to challenge, in accordance with the requirements of paragraph (e) of the Section H clause entitled “Validation Of Restrictive Markings On Technical Data” and paragraph (e) of the Section H clause entitled “Validation Of Asserted Restrictions—Computer Software” of this contract, the contractor’s assertion of a use or release restriction on the technical data. The Government's rights to use said data or computer software shall be pursuant to the “Rights in Technical Data and Computer Software” clause of this contract. This clause shall be flowed down to first and second tier subcontractors

(End of clause)

### **H.24 LIMITATIONS ON THE USE OR DISCLOSURE OF GOVERNMENT-FURNISHED INFORMATION MARKED WITH RESTRICTIVE LEGENDS)**

(a)(1) For contracts in which the Government will furnish the Contractor with technical data, the terms "covered Government support contractor," "limited rights," and "Government purpose rights" are defined in the Section H clause entitled “Rights in Technical Data–Noncommercial Items.”

(2) For contracts in which the Government will furnish the Contractor with computer software or computer software documentation, the terms "covered Government support contractor," "government purpose rights," and "restricted rights" are defined in the Section H clause entitled “Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation.”

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

(3) For Small Business Innovation Research program contracts, the terms "covered Government support contractor," "limited rights," and "restricted rights" are defined in the Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program.

(b) Technical data or computer software provided to the Contractor as Government-furnished information (GFI) under this contract may be subject to restrictions on use, modification, reproduction, release, performance, display, or further disclosure.

(1) *GFI marked with limited or restricted rights legends.*

(i) The Contractor shall use, modify, reproduce, perform, or display technical data received from the Government with limited rights legends or computer software received with restricted rights legends only in the performance of this contract. The Contractor shall not, without the express written permission of the party whose name appears in the legend, release or disclose such data or software to any unauthorized person.

(ii) If the Contractor is a covered Government support contractor, the Contractor further agrees and acknowledges that—

(A) The data or software will be accessed and used only for the purposes stated in this contract and shall not be used to compete for any Government or non-Government contract;

(B) The Contractor will take all reasonable steps to protect the technical data or computer software against any unauthorized release or disclosure;

(C) The Contractor will ensure that the party whose name appears in the legend is notified of the Contractor's access or use of such data or software;

(D) The Contractor will enter into a non-disclosure agreement with the party whose name appears in the legend, if required to do so by that party, and that any such non-disclosure agreement will implement the restrictions on the Contractor's use of such data or software as set forth in this clause, and shall not include any additional terms and conditions unless mutually agreed to by the parties to the non-disclosure agreement;

(E) The Contractor shall provide a copy of any such non-disclosure agreement or waiver to the Contracting Officer, upon request; and

(F) That a breach of these obligations or restrictions may subject the Contractor to—

(1) Criminal, civil, administrative, and contractual actions in law and equity for penalties, damages, and other appropriate remedies by the United States; and

(2) Civil actions for damages and other appropriate remedies by the party whose name appears in the legend.

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

(2) *GFI marked with government purpose rights legends.* The Contractor shall use technical data or computer software received from the Government with government purpose rights legends for government purposes only. The Contractor shall not, without the express written permission of the party whose name appears in the restrictive legend, use, modify, reproduce, release, perform, or display such data or software for any commercial purpose or disclose such data or software to a person other than its subcontractors, suppliers, or prospective subcontractors or suppliers, who require the data or software to submit offers for, or perform, contracts under this contract. Prior to disclosing the data or software, the Contractor shall require the persons to whom disclosure will be made to complete and sign the non-disclosure agreement at J-???

(3) *GFI marked with specially negotiated license rights legends.* The Contractor shall use, modify, reproduce, release, perform, or display technical data or computer software received from the Government with specially negotiated license legends only as permitted in the license. Such data or software may not be released or disclosed to other persons unless permitted by the license and, prior to release or disclosure, the intended recipient has completed the Section J attachment entitled "Use and non-disclosure agreement." The Contractor shall modify paragraph (1)(c) of the non-disclosure agreement to reflect the recipient's obligations regarding use, modification, reproduction, release, performance, display, and disclosure of the data or software.

(4) *GFI marked with commercial restrictive legends.*

(i) The Contractor shall use, modify, reproduce, perform, or display technical data that is or pertains to a commercial item and is received from the Government with a commercial restrictive legend (i.e., marked to indicate that such data are subject to use, modification, reproduction, release, performance, display, or disclosure restrictions) only in the performance of this contract. The Contractor shall not, without the express written permission of the party whose name appears in the legend, use the technical data to manufacture additional quantities of the commercial items, or release or disclose such data to any unauthorized person.

(ii) If the Contractor is a covered Government support contractor, the Contractor further agrees and acknowledges that—

(A) The data or software will be accessed and used only for the purposes stated in this contract and shall not be used to compete for any Government or non-Government contract;

(B) The Contractor will take all reasonable steps to protect the technical data against any unauthorized release or disclosure;

(C) The Contractor will ensure that the party whose name appears in the legend is or has been notified of the Contractor's access or use of such data;

(D) The Contractor will enter into a non-disclosure agreement with the party whose name appears in the legend, if required to do so by that party, and that any such non-disclosure agreement will implement the restrictions on the Contractor's use of such data as set forth in this clause, and shall not include any additional terms and conditions unless mutually agreed to by the parties to the non-disclosure agreement;



## Part I - The Schedule (Continued)

## Section H - Special Contract Requirements (Continued)

(E) The Contractor shall provide a copy of any such non-disclosure agreement or waiver to the Contracting Officer, upon request; and

(F) That a breach of these obligations or restrictions may subject the Contractor to—

(1) Criminal, civil, administrative, and contractual actions in law and equity for penalties, damages, and other appropriate remedies by the United States; and

(2) Civil actions for damages and other appropriate remedies by the contractor or subcontractor whose technical data is affected by the breach.

(c) *Indemnification and creation of third party beneficiary rights.* The Contractor agrees—

(1) To indemnify and hold harmless the Government, its agents, and employees from every claim or liability, including attorneys fees, court costs, and expenses, arising out of, or in any way related to, the misuse or unauthorized modification, reproduction, release, performance, display, or disclosure of technical data or computer software received from the Government with restrictive legends by the Contractor or any person to whom the Contractor has released or disclosed such data or software; and

(2) That the party whose name appears on the restrictive legend, in addition to any other rights it may have, is a third party beneficiary who has the right of direct action against the Contractor, or any person to whom the Contractor has released or disclosed such data or software, for the unauthorized duplication, release, or disclosure of technical data or computer software subject to restrictive legends.

(end of clause)

## **H.25 RIGHTS IN TECHNICAL DATA – NONCOMMERCIAL ITEMS**

(a) *Definitions.* As used in this clause—

(1) “Computer data base” means a collection of data recorded in a form capable of being processed by a computer. The term does not include computer software.

(2) “Computer program” means a set of instructions, rules, or routines recorded in a form that is capable of causing a computer to perform a specific operation or series of operations.

(3) “Computer software” means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer data bases or computer software documentation.

(4) “Computer software documentation” means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

(5) "Covered Government support contractor" means a contractor under a contract, the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of a program or effort (rather than to directly furnish an end item or service to accomplish a program or effort), provided that the contractor—

(i) Is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the type developed or produced on the program or effort; and

(ii) Receives access to technical data or computer software for performance of a Government contract that contains the clause substantially similar to DFARS clause [252.227-7025](#), Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(6) "Detailed manufacturing or process data" means technical data that describe the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.

(7) "Developed" means that an item, component, or process exists and is workable. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component, or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item, component, or process, and the state of the art. To be considered "developed," the item, component, or process need not be at the stage where it could be offered for sale or sold on the commercial market, nor must the item, component, or process be actually reduced to practice within the meaning of Title 35 of the United States Code.

(8) "Developed exclusively at private expense" means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof.

(i) Private expense determinations should be made at the lowest practicable level.

(ii) Under fixed-price contracts, when total costs are greater than the firm-fixed-price or ceiling price of the contract, the additional development costs necessary to complete development shall not be considered when

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

determining whether development was at government, private, or mixed expense.

(9) “Developed exclusively with government funds” means development was not accomplished exclusively or partially at private expense.

(10) “Developed with mixed funding” means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract.

(11) “Form, fit, and function data” means technical data that describes the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

(12) “Government purpose” means any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations, or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or authorize others to do so.

(13) “Government purpose rights” means the rights to—

(i) Use, modify, reproduce, release, perform, display, or disclose technical data within the Government without restriction; and

(ii) Release or disclose technical data outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose that data for United States government purposes.

(14) “Limited rights” means the rights to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the Government, use the technical data for manufacture, or authorize the technical data to be used by another party, except that the Government may reproduce, release, or disclose such data or authorize the use or reproduction of the data by persons outside the Government if—

(i) The reproduction, release, disclosure, or use is—

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

(A) Necessary for emergency repair and overhaul;

(B) Necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes; or

(C) A release or disclosure to—

(1) A covered Government support contractor, for use, modification, reproduction, performance, display, or release or disclosure to authorized person(s) in performance of a Government contract; or

(2) A foreign government, of technical data, (other than detailed manufacturing or process data) to, or use of such data by the foreign government is in the interest of the Government and is required for evaluational or informational purposes;

(ii) The recipient of the technical data is subject to a prohibition on the further reproduction, release, disclosure, or use of the technical data; and

(iii) The contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, or use.

(15) "Technical data" means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information.

(16) "Unlimited rights" means rights to use, modify, reproduce, perform, display, release, or disclose technical data in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so.

(17) "Vessel design" means the design of a vessel, boat, or craft, and its components, including the hull, decks, superstructure, and the exterior surface shape of all external shipboard equipment and systems. The term includes designs described in 10 U.S.C. 7317, and designs protectable under 17 U.S.C. 1301, *et seq.*

(b) *Rights in technical data.* The Contractor grants or shall obtain for the Government the following royalty free, world-wide, nonexclusive, irrevocable license rights in technical data other than computer software documentation (see the Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation clause of this contract for rights in computer software documentation):

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

(1) *Unlimited rights.* The Government shall have unlimited rights in technical data that are—

- (i) Data pertaining to an item, component, or process which has been or will be developed exclusively with Government funds;
- (ii) Studies, analyses, test data, or similar data produced for this contract, when the study, analysis, test, or similar work was specified as an element of performance;
- (iii) Created exclusively with Government funds in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes;
- (iv) Form, fit, and function data;
- (v) Necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data);
- (vi) Corrections or changes to technical data furnished to the Contractor by the Government;
- (vii) Otherwise publicly available or have been released or disclosed by the Contractor or subcontractor without restrictions on further use, release or disclosure, other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the technical data to another party or the sale or transfer of some or all of a business entity or its assets to another party;
- (viii) Data in which the Government has obtained unlimited rights under another Government contract or as a result of negotiations; or
- (ix) Data furnished to the Government, under this or any other Government contract or subcontract thereunder, with—
  - (A) Government purpose license rights or limited rights and the restrictive condition(s) has/have expired; or
  - (B) Government purpose rights and the Contractor's exclusive right to use such data for commercial purposes has expired.

(2) *Government purpose rights.*

- (i) The Government shall have government purpose rights for a five-year period, or such other period as may be negotiated, in technical data—

## Part I - The Schedule (Continued)

## Section H - Special Contract Requirements (Continued)

(A) That pertain to items, components, or processes developed with mixed funding except when the Government is entitled to unlimited rights in such data as provided in paragraphs (b)(1)(ii) and (b)(1)(iv) through (b)(1)(ix) of this clause; or

(B) Created with mixed funding in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes.

(ii) The five-year period, or such other period as may have been negotiated, shall commence upon execution of the contract, subcontract, letter contract (or similar contractual instrument), contract modification, or option exercise that required development of the items, components, or processes or creation of the data described in paragraph (b)(2)(i)(B) of this clause. Upon expiration of the five-year or other negotiated period, the Government shall have unlimited rights in the technical data.

(iii) The Government shall not release or disclose technical data in which it has government purpose rights unless—

(A) Prior to release or disclosure, the intended recipient is subject to the non-disclosure agreement in the Section attachment entitled “Use and Non-Disclosure Agreement” or

(B) The recipient is a Government contractor receiving access to the data for performance of a Government contract that contains the clause substantially similar to the DFARS clause [252.227-7025](#), Information Marked with Restrictive Legends.

(iv) The Contractor has the exclusive right, including the right to license others, to use technical data in which the Government has obtained government purpose rights under this contract for any commercial purpose during the time period specified in the government purpose rights legend prescribed in paragraph (f)(2) of this clause.

(3) *Limited rights.*

(i) Except as provided in paragraphs (b)(1)(ii) and (b)(1)(iv) through (b)(1)(ix) of this clause, the Government shall have limited rights in technical data—

(A) Pertaining to items, components, or processes developed exclusively at private expense and marked with the limited rights legend prescribed in paragraph (f) of this clause; or

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

(B) Created exclusively at private expense in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes.

(ii) The Government shall require a recipient of limited rights data for emergency repair or overhaul to destroy the data and all copies in its possession promptly following completion of the emergency repair/overhaul and to notify the Contractor that the data have been destroyed.

(iii) The Contractor, its subcontractors, and suppliers are not required to provide the Government additional rights to use, modify, reproduce, release, perform, display, or disclose technical data furnished to the Government with limited rights. However, if the Government desires to obtain additional rights in technical data in which it has limited rights, the Contractor agrees to promptly enter into negotiations with the Contracting Officer to determine whether there are acceptable terms for transferring such rights. All technical data in which the Contractor has granted the Government additional rights shall be listed or described in a license agreement made part of the contract. The license shall enumerate the additional rights granted the Government in such data.

(iv) The Contractor acknowledges that—

(A) Limited rights data is authorized to be released or disclosed to covered Government support contractors;

(B) The Contractor will be notified of such release or disclosure;

(C) The Contractor (or the party asserting restrictions as identified in the limited rights legend) may require each such covered Government support contractor to enter into a non-disclosure agreement directly with the Contractor (or the party asserting restrictions) regarding the covered Government support contractor's use of such data, or alternatively, that the Contractor (or party asserting restrictions) may waive in writing the requirement for a non-disclosure agreement;

(D) Any such non-disclosure agreement shall address the restrictions on the covered Government support contractor's use of the limited rights data as set forth in the clause at H-?? of this contract and shall not include any additional terms and conditions unless mutually agreed to by the parties to the non-disclosure agreement; and

(E) The Contractor shall provide a copy of any such non-disclosure agreement or waiver to the Contracting Officer, upon request.

## Part I - The Schedule (Continued)

## Section H - Special Contract Requirements (Continued)

(4) *Specifically negotiated license rights.* The standard license rights granted to the Government under paragraphs (b)(1) through (b)(3) of this clause, including the period during which the Government shall have government purpose rights in technical data, may be modified by mutual agreement to provide such rights as the parties consider appropriate but shall not provide the Government lesser rights than are enumerated in paragraph (a)(14) of this clause. Any rights so negotiated shall be identified in a license agreement made part of this contract.

(5) *Prior government rights.* Technical data that will be delivered, furnished, or otherwise provided to the Government under this contract, in which the Government has previously obtained rights shall be delivered, furnished, or provided with the pre-existing rights, unless—

(i) The parties have agreed otherwise; or

(ii) Any restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose the data have expired or no longer apply.

(6) *Release from liability.* The Contractor agrees to release the Government from liability for any release or disclosure of technical data made in accordance with (b)(7) *Vessel designs.* For a vessel design (including a vessel design embodied in a useful article) that is developed or delivered under this contract, the Government shall have the right to make and have made any useful article that embodies the vessel design, to import the article, to sell the article, and to distribute the article for sale or to use the article in trade, to the same extent that the Government is granted rights in the technical data pertaining to the vessel design paragraph (a)(14) or (b)(2)(iii) of this clause, in accordance with the terms of a license negotiated under paragraph (b)(4) of this clause, or by others to whom the recipient has released or disclosed the data and to seek relief solely from the party who has improperly used, modified, reproduced, released, performed, displayed, or disclosed Contractor data marked with restrictive legends.

(c) *Contractor rights in technical data.* All rights not granted to the Government are retained by the Contractor.

(d) *Third party copyrighted data.* The Contractor shall not, without the written approval of the Contracting Officer, incorporate any copyrighted data in the technical data to be delivered under this contract unless the Contractor is the copyright owner or has obtained for the Government the license rights necessary to perfect a license or licenses in the deliverable data of the appropriate scope set forth in paragraph (b) of this clause, and has affixed a statement of the license or licenses obtained on behalf of the Government and other persons to the data transmittal document.

(e) *Identification and delivery of data to be furnished with restrictions on use, release, or disclosure.*



Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

(1) This paragraph does not apply to restrictions based solely on copyright.

(2) Except as provided in paragraph (e)(3) of this clause, technical data that the Contractor asserts should be furnished to the Government with restrictions on use, release, or disclosure are identified in an attachment to this contract (the Attachment). The Contractor shall not deliver any data with restrictive markings unless the data are listed on the Attachment.

(3) In addition to the assertions made in the Attachment, other assertions may be identified after award when based on new information or inadvertent omissions unless the inadvertent omissions would have materially affected the source selection decision. Such identification and assertion shall be submitted to the Contracting Officer as soon as practicable prior to the scheduled date for delivery of the data, in the following format, and signed by an official authorized to contractually obligate the Contractor:

Identification and Assertion of Restrictions on the Government's  
Use, Release, or Disclosure of Technical Data.

The Contractor asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following technical data should be restricted—

Technical Data to be Furnished With Restrictions*	Basis for Assertion**	Asserted Rights Category***	Name of Person Asserting Restrictions****
(LIST)	(LIST)	(LIST)	(LIST)

\*If the assertion is applicable to items, components, or processes developed at private expense, identify both the data and each such item, component, or process.

\*\*Generally, the development of an item, component, or process at private expense, either exclusively or partially, is the only basis for asserting restrictions on the Government's rights to use, release, or disclose technical data pertaining to such items, components, or processes. Indicate whether development was exclusively or partially at private expense. If development was not at private expense, enter the specific reason for asserting that the Government's rights should be restricted.

\*\*\*Enter asserted rights category (e.g., government purpose license rights from a prior contract, rights in SBIR data generated under another contract, limited or government purpose rights under this or a prior contract, or specifically negotiated licenses).

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

\*\*\*\*Corporation, individual, or other person, as appropriate.

Date \_\_\_\_\_  
Printed Name and Title \_\_\_\_\_  
Signature \_\_\_\_\_

(End of identification and assertion)

(4) When requested by the Contracting Officer, the Contractor shall provide sufficient information to enable the Contracting Officer to evaluate the Contractor's assertions. The Contracting Officer reserves the right to add the Contractor's assertions to the Attachment and validate any listed assertion, at a later date, in accordance with the procedures of the Validation of Restrictive Markings on Technical Data clause of this contract.

(f) *Marking requirements.* The Contractor, and its subcontractors or suppliers, may only assert restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data to be delivered under this contract by marking the deliverable data subject to restriction. Except as provided in paragraph (f)(5) of this clause, only the following legends are authorized under this contract: the government purpose rights legend at paragraph (f)(2) of this clause; the limited rights legend at paragraph (f)(3) of this clause; or the special license rights legend at paragraph (f)(4) of this clause; and/or a notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(1) *General marking instructions.* The Contractor, or its subcontractors or suppliers, shall conspicuously and legibly mark the appropriate legend on all technical data that qualify for such markings. The authorized legends shall be placed on the transmittal document or storage container and, for printed material, each page of the printed material containing technical data for which restrictions are asserted. When only portions of a page of printed material are subject to the asserted restrictions, such portions shall be identified by circling, underscoring, with a note, or other appropriate identifier. Technical data transmitted directly from one computer or computer terminal to another shall contain a notice of asserted restrictions. Reproductions of technical data or any portions thereof subject to asserted restrictions shall also reproduce the asserted restrictions.

(2) *Government purpose rights markings.* Data delivered or otherwise furnished to the Government with government purpose rights shall be marked as follows:

GOVERNMENT PURPOSE RIGHTS

Contract No.  
Contractor Name

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

Contractor Address

Expiration Date

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(2) of the Rights in Technical Data—Noncommercial Items clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(3) *Limited rights markings.* Data delivered or otherwise furnished to the Government with limited rights shall be marked with the following legend:

LIMITED RIGHTS

	Contract No.
	Contractor Name
	Contractor Address

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(3) of the Rights in Technical Data--Noncommercial Items clause contained in the above identified contract. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such data must promptly notify the above named Contractor.

(End of legend)

(4) *Special license rights markings.*

(i) Data in which the Government's rights stem from a specifically negotiated license shall be marked with the following legend:

SPECIAL LICENSE RIGHTS

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these data are restricted by Contract No. \_\_\_\_ (Insert contract number) \_\_\_\_, License No. \_\_\_\_ (Insert license identifier) \_\_\_\_\_. Any reproduction of technical data or

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(ii) For purposes of this clause, special licenses do not include government purpose license rights acquired under a prior contract (see paragraph (b)(5) of this clause).

(5) *Pre-existing data markings.* If the terms of a prior contract or license permitted the Contractor to restrict the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data deliverable under this contract, and those restrictions are still applicable, the Contractor may mark such data with the appropriate restrictive legend for which the data qualified under the prior contract or license. The marking procedures in paragraph (f)(1) of this clause shall be followed.

(g) *Contractor procedures and records.* Throughout performance of this contract, the Contractor and its subcontractors or suppliers that will deliver technical data with other than unlimited rights, shall—

- (1) Have, maintain, and follow written procedures sufficient to assure that restrictive markings are used only when authorized by the terms of this clause; and
- (2) Maintain records sufficient to justify the validity of any restrictive markings on technical data delivered under this contract.

(h) *Removal of unjustified and nonconforming markings.*

(1) *Unjustified technical data markings.* The rights and obligations of the parties regarding the validation of restrictive markings on technical data furnished or to be furnished under this contract are contained in the Validation of Restrictive Markings on Technical Data H-?? clause of this contract. Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may ignore or, at the Contractor's expense, correct or strike a marking if, in accordance with the procedures in the Validation of Restrictive Markings on Technical Data clause of this contract, a restrictive marking is determined to be unjustified.

(2) *Nonconforming technical data markings.* A nonconforming marking is a marking placed on technical data delivered or otherwise furnished to the Government under this contract that is not in the format authorized by this contract. Correction of nonconforming markings is not subject to the Validation of Restrictive Markings on Technical Data clause of this contract. If the Contracting Officer notifies the Contractor of a nonconforming marking and the Contractor fails

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

to remove or correct such marking within sixty (60) days, the Government may ignore or, at the Contractor's expense, remove or correct any nonconforming marking.

(i) *Relation to patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(j) *Limitation on charges for rights in technical data.*

(1) The Contractor shall not charge to this contract any cost, including, but not limited to, license fees, royalties, or similar charges, for rights in technical data to be delivered under this contract when—

(i) The Government has acquired, by any means, the same or greater rights in the data; or

(ii) The data are available to the public without restrictions.

(2) The limitation in paragraph (j)(1) of this clause—

(i) Includes costs charged by a subcontractor or supplier, at any tier, or costs incurred by the Contractor to acquire rights in subcontractor or supplier technical data, if the subcontractor or supplier has been paid for such rights under any other Government contract or under a license conveying the rights to the Government; and

(ii) Does not include the reasonable costs of reproducing, handling, or mailing the documents or other media in which the technical data will be delivered.

(k) *Applicability to subcontractors or suppliers.*

(1) The Contractor shall ensure that the rights afforded its subcontractors and suppliers similar to that under 10 U.S.C. 2320, 10 U.S.C. 2321, and the identification, assertion, and delivery processes of paragraph (e) of this clause are recognized and protected.

(2) Whenever any technical data for noncommercial items, or for commercial items developed in any part at Government expense, is to be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this same clause in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties. This clause will govern the technical data pertaining to noncommercial items or to any portion of a commercial item that was developed in any part at Government expense, and the Section H clause entitled “Technical

## Part I - The Schedule (Continued)

## Section H - Special Contract Requirements (Continued)

Data-Commercial Items” will govern the technical data pertaining to any portion of a commercial item that was developed exclusively at private expense. No other clause shall be used to enlarge or diminish the Government's, the Contractor's, or a higher-tier subcontractor's or supplier's rights in a subcontractor's or supplier's technical data.

(3) Technical data required to be delivered by a subcontractor or supplier shall normally be delivered to the next higher-tier contractor, subcontractor, or supplier. However, when there is a requirement in the prime contract for data which may be submitted with other than unlimited rights by a subcontractor or supplier, then said subcontractor or supplier may fulfill its requirement by submitting such data directly to the Government, rather than through a higher-tier contractor, subcontractor, or supplier.

(4) The Contractor and higher-tier subcontractors or suppliers shall not use their power to award contracts as economic leverage to obtain rights in technical data from their subcontractors or suppliers.

(5) In no event shall the Contractor use its obligation to recognize and protect subcontractor or supplier rights in technical data as an excuse for failing to satisfy its contractual obligation to the Government.

(End of clause)

**H.26 RIGHTS IN NONCOMMERCIAL COMPUTER SOFTWARE AND  
NONCOMMERCIAL COMPUTER SOFTWARE DOCUMENTATION**

(a) *Definitions.* As used in this clause—

(1) “Commercial computer software” means software developed or regularly used for non-governmental purposes which—

(i) Has been sold, leased, or licensed to the public;

(ii) Has been offered for sale, lease, or license to the public;

(iii) Has not been offered, sold, leased, or licensed to the public but will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of this contract; or

(iv) Satisfies a criterion expressed in paragraph (a)(1)(i), (ii), or (iii) of this clause and would require only minor modification to meet the requirements of this contract.

## Part I - The Schedule (Continued)

## Section H - Special Contract Requirements (Continued)

(2) "Computer database" means a collection of recorded data in a form capable of being processed by a computer. The term does not include computer software.

(3) "Computer program" means a set of instructions, rules, or routines, recorded in a form that is capable of causing a computer to perform a specific operation or series of operations.

(4) "Computer software" means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer databases or computer software documentation.

(5) "Computer software documentation" means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

(6) "Covered Government support contractor" means a contractor under a contract, the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of a program or effort (rather than to directly furnish an end item or service to accomplish a program or effort), provided that the contractor—

(i) Is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the type developed or produced on the program or effort; and

(ii) Receives access to technical data or computer software for performance of a Government contract that contains the clause entitled "Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends."

(7) "Developed" means that—

(i) A computer program has been successfully operated in a computer and tested to the extent sufficient to demonstrate to

## Part I - The Schedule (Continued)

## Section H - Special Contract Requirements (Continued)

reasonable persons skilled in the art that the program can reasonably be expected to perform its intended purpose;

(ii) Computer software, other than computer programs, has been tested or analyzed to the extent sufficient to demonstrate to reasonable persons skilled in the art that the software can reasonably be expected to perform its intended purpose; or

(iii) Computer software documentation required to be delivered under a contract has been written, in any medium, in sufficient detail to comply with requirements under that contract.

(8) "Developed exclusively at private expense" means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof.

(i) Private expense determinations should be made at the lowest practicable level.

(ii) Under fixed-price contracts, when total costs are greater than the firm-fixed-price or ceiling price of the contract, the additional development costs necessary to complete development shall not be considered when determining whether development was at government, private, or mixed expense.

(9) "Developed exclusively with government funds" means development was not accomplished exclusively or partially at private expense.

(10) "Developed with mixed funding" means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract.

(11) "Government purpose" means any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation for commercial purposes or authorize others to do so.

(12) "Government purpose rights" means the rights to—



## Part I - The Schedule (Continued)

## Section H - Special Contract Requirements (Continued)

(i) Use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation within the Government without restriction; and

(ii) Release or disclose computer software or computer software documentation outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose the software or documentation for United States government purposes.

(13) "Minor modification" means a modification that does not significantly alter the nongovernmental function or purpose of the software or is of the type customarily provided in the commercial marketplace.

(14) "Noncommercial computer software" means software that does not qualify as commercial computer software under paragraph (a)(1) of this clause.

(15) "Restricted rights" apply only to noncommercial computer software and mean the Government's rights to—

(i) Use a computer program with one computer at one time. The program may not be accessed by more than one terminal or central processing unit or time shared unless otherwise permitted by this contract;

(ii) Transfer a computer program to another Government agency without the further permission of the Contractor if the transferor destroys all copies of the program and related computer software documentation in its possession and notifies the licensor of the transfer. Transferred programs remain subject to the provisions of this clause;

(iii) Make the minimum number of copies of the computer software required for safekeeping (archive), backup, or modification purposes;

(iv) Modify computer software provided that the Government may—

(A) Use the modified software only as provided in paragraphs (a)(15)(i) and (iii) of this clause; and

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

(B) Not release or disclose the modified software except as provided in paragraphs (a)(15)(ii), (v), (vi) and (vii) of this clause;

(v) Permit contractors or subcontractors performing service contracts (see 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations, provided that—

(A) The Government notifies the party which has granted restricted rights that a release or disclosure to particular contractors or subcontractors was made;

(B) Such contractors or subcontractors are subject to the section J attachment entitled “Use and non-disclosure Agreement” or are Government contractors receiving access to the software for performance of a Government contract that contains the clause entitled Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends;

(C) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(15)(iv) of this clause, for any other purpose; and

(D) Such use is subject to the limitation in paragraph (a)(15)(i) of this clause;

(vi) Permit contractors or subcontractors performing emergency repairs or overhaul of items or components of items procured under this or a related contract to use the computer software when necessary to perform the repairs or overhaul, or to modify the computer software to reflect the repairs or overhaul made, provided that—

(A) The intended recipient is subject to the use and non-disclosure agreement at H-???? of this contract, or is a Government contractor receiving access to the software for

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

performance of a Government contract that contains the clause substantially similar to DFARS [252.227-7025](#), Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends; and

(B) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(15)(iv) of this clause, for any other purpose; and

(vii) Permit covered Government support contractors to use, modify, reproduce, perform, display, or release or disclose the computer software to authorized person(s) in the performance of Government contracts that contain the clause substantially similar to DFARS [252.227-7025](#), Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(16) “Unlimited rights” means rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Rights in computer software or computer software documentation.* The Contractor grants or shall obtain for the Government the following royalty free, world-wide, nonexclusive, irrevocable license rights in noncommercial computer software or computer software documentation. All rights not granted to the Government are retained by the Contractor.

(1) *Unlimited rights.* The Government shall have unlimited rights in—

(i) Computer software developed exclusively with Government funds;

(ii) Computer software documentation required to be delivered under this contract;

(iii) Corrections or changes to computer software or computer software documentation furnished to the Contractor by the Government;

## Part I - The Schedule (Continued)

## Section H - Special Contract Requirements (Continued)

(iv) Computer software or computer software documentation that is otherwise publicly available or has been released or disclosed by the Contractor or subcontractor without restriction on further use, release or disclosure, other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the software to another party or the sale or transfer of some or all of a business entity or its assets to another party;

(v) Computer software or computer software documentation obtained with unlimited rights under another Government contract or as a result of negotiations; or

(vi) Computer software or computer software documentation furnished to the Government, under this or any other Government contract or subcontract thereunder with—

(A) Restricted rights in computer software, limited rights in technical data, or government purpose license rights and the restrictive conditions have expired; or

(B) Government purpose rights and the Contractor's exclusive right to use such software or documentation for commercial purposes has expired.

(2) *Government purpose rights.*

(i) Except as provided in paragraph (b)(1) of this clause, the Government shall have government purpose rights in computer software developed with mixed funding.

(ii) Government purpose rights shall remain in effect for a period of five years unless a different period has been negotiated. Upon expiration of the five-year or other negotiated period, the Government shall have unlimited rights in the computer software or computer software documentation. The government purpose rights period shall commence upon execution of the contract, subcontract, letter contract (or similar contractual instrument), contract modification, or option exercise that required development of the computer software.

(iii) The Government shall not release or disclose computer software in which it has government purpose rights to any other person unless—

## Part I - The Schedule (Continued)

## Section H - Special Contract Requirements (Continued)

(A) Prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement Section J attachment entitled "Use and Non Disclosure Agreement" of this contract; or

(B) The recipient is a Government contractor receiving access to the software or documentation for performance of a Government contract that contains the clause substantially similar to DFARS [252.227-7025](#), Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends.

(3) *Restricted rights.*

(i) The Government shall have restricted rights in noncommercial computer software required to be delivered or otherwise provided to the Government under this contract that were developed exclusively at private expense.

(ii) The Contractor, its subcontractors, or suppliers are not required to provide the Government additional rights in noncommercial computer software delivered or otherwise provided to the Government with restricted rights. However, if the Government desires to obtain additional rights in such software, the Contractor agrees to promptly enter into negotiations with the Contracting Officer to determine whether there are acceptable terms for transferring such rights. All noncommercial computer software in which the Contractor has granted the Government additional rights shall be listed or described in a license agreement made part of the contract (see paragraph (b)(4) of this clause). The license shall enumerate the additional rights granted the Government.

(iii) The Contractor acknowledges that—

(A) Restricted rights computer software is authorized to be released or disclosed to covered Government support contractors;

(B) The Contractor will be notified of such release or disclosure;

(C) The Contractor (or the party asserting restrictions, as identified in the restricted rights legend) may require each

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

such covered Government support contractor to enter into a non-disclosure agreement directly with the Contractor (or the party asserting restrictions) regarding the covered Government support contractor's use of such software, or alternatively, that the Contractor (or party asserting restrictions) may waive in writing the requirement for a non-disclosure agreement;

(D) Any such non-disclosure agreement shall address the restrictions on the covered Government support contractor's use of the restricted rights software as set forth in the clause Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, and shall not include any additional terms and conditions unless mutually agreed to by the parties to the non-disclosure agreement; and

(E) The Contractor shall provide a copy of any such non-disclosure agreement or waiver to the Contracting Officer, upon request.

(4) *Specifically negotiated license rights.*

(i) The standard license rights granted to the Government under paragraphs (b)(1) through (b)(3) of this clause, including the period during which the Government shall have government purpose rights in computer software, may be modified by mutual agreement to provide such rights as the parties consider appropriate but shall not provide the Government lesser rights in computer software than are enumerated in paragraph (a)(15) of this clause or lesser rights in computer software documentation than are enumerated in paragraph (a)(14) of the Rights in Technical Data--Noncommercial Items clause of this contract.

(ii) Any rights so negotiated shall be identified in a license agreement made part of this contract.

(5) *Prior government rights.* Computer software or computer software documentation that will be delivered, furnished, or otherwise provided to the Government under this contract, in which the Government has previously obtained rights shall be delivered, furnished, or provided with the pre-existing rights, unless—

(i) The parties have agreed otherwise; or

## Part I - The Schedule (Continued)

## Section H - Special Contract Requirements (Continued)

(ii) Any restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose the data have expired or no longer apply.

(6) *Release from liability.* The Contractor agrees to release the Government from liability for any release or disclosure of computer software made in accordance with paragraph (a)(15) or (b)(2)(iii) of this clause, in accordance with the terms of a license negotiated under paragraph (b)(4) of this clause, or by others to whom the recipient has released or disclosed the software, and to seek relief solely from the party who has improperly used, modified, reproduced, released, performed, displayed, or disclosed Contractor software marked with restrictive legends.

(c) *Rights in derivative computer software or computer software documentation.* The Government shall retain its rights in the unchanged portions of any computer software or computer software documentation delivered under this contract that the Contractor uses to prepare, or includes in, derivative computer software or computer software documentation.

(d) *Third party copyrighted computer software or computer software documentation.* The Contractor shall not, without the written approval of the Contracting Officer, incorporate any copyrighted computer software or computer software documentation in the software or documentation to be delivered under this contract unless the Contractor is the copyright owner or has obtained for the Government the license rights necessary to perfect a license or licenses in the deliverable software or documentation of the appropriate scope set forth in paragraph (b) of this clause, and prior to delivery of such—

- (1) Computer software, has provided a statement of the license rights obtained in a form acceptable to the Contracting Officer; or
- (2) Computer software documentation, has affixed to the transmittal document a statement of the license rights obtained.

(e) *Identification and delivery of computer software and computer software documentation to be furnished with restrictions on use, release, or disclosure.*

- (1) This paragraph does not apply to restrictions based solely on copyright.
- (2) Except as provided in paragraph (e)(3) of this clause, computer software that the Contractor asserts should be furnished to the

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

Government with restrictions on use, release, or disclosure is identified in an attachment to this contract (the Attachment). The Contractor shall not deliver any software with restrictive markings unless the software is listed on the Attachment.

(3) In addition to the assertions made in the Attachment, other assertions may be identified after award when based on new information or inadvertent omissions unless the inadvertent omissions would have materially affected the source selection decision. Such identification and assertion shall be submitted to the Contracting Officer as soon as practicable prior to the scheduled date for delivery of the software, in the following format, and signed by an official authorized to contractually obligate the Contractor:

Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Computer Software.

The Contractor asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following computer software should be restricted:

Computer Software			Name of Person
to be Furnished	Basis for	Asserted Rights	Asserting
With Restrictions*	Assertion**	Category***	Restrictions****
(LIST)	(LIST)	(LIST)	(LIST)

\*Generally, development at private expense, either exclusively or partially, is the only basis for asserting restrictions on the Government's rights to use, release, or disclose computer software.

\*\*Indicate whether development was exclusively or partially at private expense. If development was not at private expense, enter the specific reason for asserting that the Government's rights should be restricted.

\*\*\*Enter asserted rights category (e.g., restricted or government purpose rights in computer software, government purpose license rights from a prior contract, rights in SBIR software generated under another contract, or specifically negotiated licenses).

\*\*\*\*Corporation, individual, or other person, as appropriate.



Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

Date \_\_\_\_\_  
Printed Name and Title \_\_\_\_\_  
\_\_\_\_\_  
Signature \_\_\_\_\_

(End of identification and assertion)

(4) When requested by the Contracting Officer, the Contractor shall provide sufficient information to enable the Contracting Officer to evaluate the Contractor's assertions. The Contracting Officer reserves the right to add the Contractor's assertions to the Attachment and validate any listed assertion, at a later date, in accordance with the procedures of the Validation of Asserted Restrictions—Computer Software clause of this contract.

(f) *Marking requirements.* The Contractor, and its subcontractors or suppliers, may only assert restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose computer software by marking the deliverable software or documentation subject to restriction. Except as provided in paragraph (f)(5) of this clause, only the following legends are authorized under this contract: the government purpose rights legend at paragraph (f)(2) of this clause; the restricted rights legend at paragraph (f)(3) of this clause; or the special license rights legend at paragraph (f)(4) of this clause; and/or a notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(1) *General marking instructions.* The Contractor, or its subcontractors or suppliers, shall conspicuously and legibly mark the appropriate legend on all computer software that qualify for such markings. The authorized legends shall be placed on the transmittal document or software storage container and each page, or portions thereof, of printed material containing computer software for which restrictions are asserted. Computer software transmitted directly from one computer or computer terminal to another shall contain a notice of asserted restrictions. However, instructions that interfere with or delay the operation of computer software in order to display a restrictive rights legend or other license statement at any time prior to or during use of the computer software, or otherwise cause such interference or delay, shall not be inserted in software that will or might be used in combat or situations that simulate combat conditions, unless the Contracting Officer's written permission to deliver such software has been obtained prior to delivery. Reproductions of computer software or any portions thereof subject to asserted restrictions, shall also reproduce the asserted restrictions.

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

(2) *Government purpose rights markings.* Computer software delivered or otherwise furnished to the Government with government purpose rights shall be marked as follows:

GOVERNMENT PURPOSE RIGHTS

Contract No.

Contractor Name

Contractor Address

Expiration Date

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by paragraph (b)(2) of the Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of the software or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(3) *Restricted rights markings.* Software delivered or otherwise furnished to the Government with restricted rights shall be marked with the following legend:

RESTRICTED RIGHTS

Contract No.

Contractor Name

Contractor Address

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by paragraph (b)(3) of the Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation clause contained in the above identified contract. Any reproduction of computer software or portions thereof marked with this legend must also reproduce the markings. Any person,

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

other than the Government, who has been provided access to such software must promptly notify the above named Contractor.

(End of legend)

(4) *Special license rights markings.*

(i) Computer software or computer software documentation in which the Government's rights stem from a specifically negotiated license shall be marked with the following legend:

SPECIAL LICENSE RIGHTS

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these data are restricted by Contract No. \_\_\_\_ (Insert contract number) \_\_\_\_, License No. \_\_\_\_ (Insert license identifier) \_\_\_\_\_. Any reproduction of computer software, computer software documentation, or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(ii) For purposes of this clause, special licenses do not include government purpose license rights acquired under a prior contract (see paragraph (b)(5) of this clause).

(5) *Pre-existing markings.* If the terms of a prior contract or license permitted the Contractor to restrict the Government's rights to use, modify, release, perform, display, or disclose computer software or computer software documentation and those restrictions are still applicable, the Contractor may mark such software or documentation with the appropriate restrictive legend for which the software qualified under the prior contract or license. The marking procedures in paragraph (f)(1) of this clause shall be followed.

(g) *Contractor procedures and records.* Throughout performance of this contract, the Contractor and its subcontractors or suppliers that will deliver computer software or computer software documentation with other than unlimited rights, shall—

(1) Have, maintain, and follow written procedures sufficient to assure that restrictive markings are used only when authorized by the terms of this clause; and

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

(2) Maintain records sufficient to justify the validity of any restrictive markings on computer software or computer software documentation delivered under this contract.

(h) *Removal of unjustified and nonconforming markings.*

(1) *Unjustified computer software or computer software documentation markings.* The rights and obligations of the parties regarding the validation of restrictive markings on computer software or computer software documentation furnished or to be furnished under this contract are contained in the Validation of Asserted Restrictions--Computer Software and the Validation of Restrictive Markings on Technical Data clauses of this contract, respectively. Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may ignore or, at the Contractor's expense, correct or strike a marking if, in accordance with the procedures of those clauses, a restrictive marking is determined to be unjustified.

(2) *Nonconforming computer software or computer software documentation markings.* A nonconforming marking is a marking placed on computer software or computer software documentation delivered or otherwise furnished to the Government under this contract that is not in the format authorized by this contract. Correction of nonconforming markings is not subject to the Validation of Asserted Restrictions--Computer Software or the Validation of Restrictive Markings on Technical Data clause of this contract. If the Contracting Officer notifies the Contractor of a nonconforming marking or markings and the Contractor fails to remove or correct such markings within sixty (60) days, the Government may ignore or, at the Contractor's expense, remove or correct any nonconforming markings.

(i) *Relation to patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(j) *Limitation on charges for rights in computer software or computer software documentation.*

(1) The Contractor shall not charge to this contract any cost, including but not limited to license fees, royalties, or similar charges, for rights in computer software or computer software documentation to be delivered under this contract when—

## Part I - The Schedule (Continued)

## Section H - Special Contract Requirements (Continued)

(i) The Government has acquired, by any means, the same or greater rights in the software or documentation; or

(ii) The software or documentation are available to the public without restrictions.

(2) The limitation in paragraph (j)(1) of this clause—

(i) Includes costs charged by a subcontractor or supplier, at any tier, or costs incurred by the Contractor to acquire rights in subcontractor or supplier computer software or computer software documentation, if the subcontractor or supplier has been paid for such rights under any other Government contract or under a license conveying the rights to the Government; and

(ii) Does not include the reasonable costs of reproducing, handling, or mailing the documents or other media in which the software or documentation will be delivered.

(k) *Applicability to subcontractors or suppliers.*

(1) Whenever any noncommercial computer software or computer software documentation is to be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this same clause in its subcontracts or other contractual instruments, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties. No other clause shall be used to enlarge or diminish the Government's, the Contractor's, or a higher tier subcontractor's or supplier's rights in a subcontractor's or supplier's computer software or computer software documentation.

(2) The Contractor and higher tier subcontractors or suppliers shall not use their power to award contracts as economic leverage to obtain rights in computer software or computer software documentation from their subcontractors or suppliers.

(3) The Contractor shall ensure that subcontractor or supplier rights are recognized and protected in the identification, assertion, and delivery processes required by paragraph (e) of this clause.

(4) In no event shall the Contractor use its obligation to recognize and protect subcontractor or supplier rights in computer software or computer software documentation as an excuse for failing to satisfy its contractual obligation to the Government.

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

(End of clause)

**H.27 TECHNICAL DATA—COMMERCIAL ITEMS**

(a) *Definitions.* As used in this clause—

(1) “Commercial item” does not include commercial computer software.

(2) “Covered Government support contractor” means a contractor under a contract, the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government’s management and oversight of a program or effort (rather than to directly furnish an end item or service to accomplish a program or effort), provided that the contractor—

(i) Is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the type developed or produced on the program or effort; and

(ii) Receives access to technical data or computer software for performance of a Government contract that contains the clause substantially similar to DFARS [252.227-7025](#) Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(3) “Form, fit, and function data” means technical data that describes the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

(4) The term “item” includes components or processes.

(5) “Technical data” means recorded information, regardless of the form or method of recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information.

(6) “Vessel design” means the design of a vessel, boat, or craft, and its components, including the hull, decks, superstructure, and the exterior surface shape of all external shipboard equipment and systems. The term includes designs

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

DESCRIBED IN 10 U.S.C. 7317, and designs protectable under 17 U.S.C. 1301, *et seq.*

(b) *License.*

(1) The Government shall have the unrestricted right to use, modify, reproduce, release, perform, display, or disclose technical data, and to permit others to do so, that—

(i) Have been provided to the Government or others without restrictions on use, modification, reproduction, release, or further disclosure other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the technical data to another party or the sale or transfer of some or all of a business entity or its assets to another party;

(ii) Are form, fit, and function data;

(iii) Are a correction or change to technical data furnished to the Contractor by the Government;

(iv) Are necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data); or

(v) Have been provided to the Government under a prior contract or licensing agreement through which the Government has acquired the rights to use, modify, reproduce, release, perform, display, or disclose the data without restrictions.

(2) Except as provided in paragraph (b)(1) of this clause, the Government may use, modify, reproduce, release, perform, display, or disclose technical data within the Government only. The Government shall not—

(i) Use the technical data to manufacture additional quantities of the commercial items; or

(ii) Release, perform, display, disclose, or authorize use of the technical data outside the Government without the Contractor's written permission unless a release, disclosure, or permitted use is necessary for emergency repair or overhaul of the commercial items furnished under this contract, or for performance of work by covered Government support contractors.

## Part I - The Schedule (Continued)

## Section H - Special Contract Requirements (Continued)

(3) The Contractor acknowledges that—(i) Technical data covered by paragraph (b)(2) of this clause is authorized to be released or disclosed to covered Government support contractors;

(ii) The Contractor will be notified of such release or disclosure;

(iii) The Contractor (or the party asserting restrictions as identified in a restrictive legend) may require each such covered Government support contractor to enter into a non-disclosure agreement directly with the Contractor (or the party asserting restrictions) regarding the covered Government support contractor's use of such data, or alternatively, that the Contractor (or party asserting restrictions) may waive in writing the requirement for an non-disclosure agreement;

(iv) Any such non-disclosure agreement shall address the restrictions on the covered Government support contractor's use of the data as set forth in the clause Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, and shall not include any additional terms and conditions unless mutually agreed to by the parties to the non-disclosure agreement; and

(v) The Contractor shall provide a copy of any such non-disclosure agreement or waiver to the Contracting Officer, upon request.

(4) Vessel designs. For a vessel design (including a vessel design embodied in a useful article) that is developed or delivered under this contract, the Government shall have the right to make and have made any useful article that embodies the vessel design, to import the article, to sell the article, and to distribute the article for sale or to use the article in trade, to the same extent that the Government is granted rights in the technical data pertaining to the vessel design.

(c) *Additional license rights.* The Contractor, its subcontractors, and suppliers are not required to provide the Government additional rights to use, modify, reproduce, release, perform, display, or disclose technical data. However, if the Government desires to obtain additional rights in technical data, the Contractor agrees to promptly enter into negotiations with the Contracting Officer to determine whether there are acceptable terms for transferring such rights. All technical data in which the Contractor has granted the Government additional rights shall be listed or described in a special license agreement



Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

made part of this contract. The license shall enumerate the additional rights granted the Government in such data.

(d) *Release from liability.* The Contractor agrees that the Government, and other persons to whom the Government may have released or disclosed technical data delivered or otherwise furnished under this contract, shall have no liability for any release or disclosure of technical data that are not marked to indicate that such data are licensed data subject to use, modification, reproduction, release, performance, display, or disclosure restrictions.

(e) *Applicability to subcontractors or suppliers.*

(1) The Contractor shall recognize and protect the rights afforded its subcontractors and suppliers under 10 U.S.C. 2320 and 10 U.S.C. 2321.

(2) Whenever any technical data related to commercial items developed in any part at private expense will be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this same clause in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties. This clause will govern the technical data pertaining to any portion of a commercial item that was developed exclusively at private expense, and the Section H clause entitled "Rights in Technical Data--Noncommercial Items" will govern the technical data pertaining to any portion of a commercial item that was developed in any part at Government expense.

(End of clause)

**H-28 TECHNICAL DATA OR COMPUTER SOFTWARE PREVIOUSLY  
DELIVERED TO THE GOVERNMENT**

The Offeror shall attach to its offer an identification of all documents or other media incorporating technical data or computer software it intends to deliver under this contract with other than unlimited rights that are identical or substantially similar to documents or other media that the Offeror has produced for, delivered to, or is obligated to deliver to the Government under any contract or subcontract. The attachment shall identify—

(a) The contract number under which the data or software were produced;

(b) The contract number under which, and the name and address of the organization to whom, the data or software were most recently delivered or will be delivered; and

## Part I - The Schedule (Continued)

## Section H - Special Contract Requirements (Continued)

(c) Any limitations on the Government's rights to use or disclose the data or software, including, when applicable, identification of the earliest date the limitations expire.

(End of clause)

**H.29 TECHNICAL DATA—WITHHOLDING OF PAYMENT**

(a) If technical data specified to be delivered under this contract, is not delivered within the time specified by this contract or is deficient upon delivery (including having restrictive markings not identified in the list described in the clause at Rights In Technical Data--Noncommercial Items (e)(2) or Rights In Noncommercial Computer Software And Noncommercial Computer Software Documentation (e)(2) of this contract), the Contracting Officer may until such data is accepted by the Government, withhold payment to the Contractor of ten percent (10%) of the total contract price or amount unless a lesser withholding is specified in the contract. Payments shall not be withheld nor any other action taken pursuant to this paragraph when the Contractor's failure to make timely delivery or to deliver such data without deficiencies arises out of causes beyond the control and without the fault or negligence of the Contractor.

(b) The withholding of any amount or subsequent payment to the Contractor shall not be construed as a waiver of any rights accruing to the Government under this contract

(End of clause)

**H-30 VALIDATION OF ASSERTED RESTRICTIONS—COMPUTER SOFTWARE**

(a) *Definitions.*

(1) As used in this clause, unless otherwise specifically indicated, the term "Contractor" means the Contractor and its subcontractors or suppliers.

(2) Other terms used in this clause are defined in the Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation clause of this contract.

(b) *Justification.* The Contractor shall maintain records sufficient to justify the validity of any markings that assert restrictions on the Government's rights to use, modify, reproduce, perform, display, release, or disclose computer software delivered or required to be delivered under this contract and shall be prepared to furnish to the Contracting Officer a written justification for such

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

restrictive markings in response to a request for information under paragraph (d) or a challenge under paragraph (f) of this clause.

(c) *Direct contact with subcontractors or suppliers.* The Contractor agrees that the Contracting Officer may transact matters under this clause directly with subcontractors or suppliers at any tier who assert restrictions on the Government's right to use, modify, reproduce, release, perform, display, or disclose computer software. Neither this clause, nor any action taken by the Government under this clause, creates or implies privity of contract between the Government and the Contractor's subcontractors or suppliers.

(d) *Requests for information.*

(1) The Contracting Officer may request the Contractor to provide sufficient information to enable the Contracting Officer to evaluate the Contractor's asserted restrictions. Such information shall be based upon the records required by this clause or other information reasonably available to the Contractor.

(2) Based upon the information provided, if the—

(i) Contractor agrees that an asserted restriction is not valid, the Contracting Officer may—

(A) Strike or correct the unjustified marking at the Contractor's expense; or

(B) Return the computer software to the Contractor for correction at the Contractor's expense. If the Contractor fails to correct or strike the unjustified restriction and return the corrected software to the Contracting Officer within sixty (60) days following receipt of the software, the Contracting Officer may correct or strike the markings at that Contractor's expense.

(ii) Contracting Officer concludes that the asserted restriction is appropriate for this contract, the Contracting Officer shall so notify the Contractor in writing.

(3) The Contractor's failure to provide a timely response to a Contracting Officer's request for information or failure to provide sufficient information to enable the Contracting Officer to evaluate an asserted restriction shall constitute reasonable grounds for questioning the validity of an asserted restriction.

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

(e) *Government right to challenge and validate asserted restrictions.*

(1) The Government, when there are reasonable grounds to do so, has the right to review and challenge the validity of any restrictions asserted by the Contractor on the Government's rights to use, modify, reproduce, release, perform, display, or disclose computer software delivered, to be delivered under this contract, or otherwise provided to the Government in the performance of this contract. Except for software that is publicly available, has been furnished to the Government without restrictions, or has been otherwise made available without restrictions, the Government may exercise this right only within six (6) years after the date(s) the software is delivered or otherwise furnished to the Government, or six (6) years following final payment under this contract, whichever is later.

(2) The absence of a challenge to an asserted restriction shall not constitute validation under this clause. Only a Contracting Officer's final decision or actions of an agency Board of Contract Appeals or a court of competent jurisdiction that sustain the validity of an asserted restriction constitute validation of the restriction.

(f) *Major systems.* When the Contracting Officer challenges an asserted restriction regarding noncommercial computer software for a major system or a subsystem or component thereof on the basis that the computer software was not developed exclusively at private expense, the Contracting Officer will sustain the challenge unless information provided by the Contractor or subcontractor demonstrates that the computer software was developed exclusively at private expense.

(g) *Challenge procedures.*

(1) A challenge must be in writing and shall—

(i) State the specific grounds for challenging the asserted restriction;

(ii) Require the Contractor to respond within sixty (60) days;

(iii) Require the Contractor to provide justification for the assertion based upon records kept in accordance with paragraph (b) of this clause and such other documentation that are reasonably available to the Contractor, in sufficient detail to enable the Contracting Officer to determine the validity of the asserted restrictions; and

## Part I - The Schedule (Continued)

## Section H - Special Contract Requirements (Continued)

(iv) State that a Contracting Officer's final decision, during the six -year period preceding this challenge, or action of a court of competent jurisdiction or Board of Contract Appeals that sustained the validity of an identical assertion made by the Contractor (or a licensee) shall serve as justification for the asserted restriction.

(2) The Contracting Officer shall extend the time for response if the Contractor submits a written request showing the need for additional time to prepare a response.

(3) The Contracting Officer may request additional supporting documentation if, in the Contracting Officer's opinion, the Contractor's explanation does not provide sufficient evidence to justify the validity of the asserted restrictions. The Contractor agrees to promptly respond to the Contracting Officer's request for additional supporting documentation.

(4) Notwithstanding challenge by the Contracting Officer, the parties may agree on the disposition of an asserted restriction at any time prior to a Contracting Officer's final decision or, if the Contractor has appealed that decision, filed suit, or provided notice of an intent to file suit, at any time prior to a decision by a court of competent jurisdiction or Board of Contract Appeals.

(5) If the Contractor fails to respond to the Contracting Officer's request for information or additional information under paragraph (g)(1) of this clause, the Contracting Officer shall issue a final decision, in accordance with paragraph (f) of this clause and the Disputes clause of this contract, pertaining to the validity of the asserted restriction.

(6) If the Contracting Officer, after reviewing the written explanation furnished pursuant to paragraph (f)(1) of this clause, or any other available information pertaining to the validity of an asserted restriction, determines that the asserted restriction has—

(i) Not been justified, the Contracting Officer shall issue promptly a final decision, in accordance with the Disputes clause of this contract, denying the validity of the asserted restriction; or

(ii) Been justified, the Contracting Officer shall issue promptly a final decision, in accordance with the Disputes clause of this contract, validating the asserted restriction.

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

(7) A Contractor receiving challenges to the same asserted restriction(s) from more than one Contracting Officer shall notify each Contracting Officer of the other challenges. The notice shall also state which Contracting Officer initiated the first in time unanswered challenge. The Contracting Officer who initiated the first in time unanswered challenge, after consultation with the other Contracting Officers who have challenged the restrictions and the Contractor, shall formulate and distribute a schedule that provides the Contractor a reasonable opportunity for responding to each challenge.

(h) *Contractor appeal* □ *Government obligation.*

(1) The Government agrees that, notwithstanding a Contracting Officer's final decision denying the validity of an asserted restriction and except as provided in paragraph (h)(3) of this clause, it will honor the asserted restriction—

(i) For a period of ninety (90) days from the date of the Contracting Officer's final decision to allow the Contractor to appeal to the appropriate Board of Contract Appeals or to file suit in an appropriate court;

(ii) For a period of one year from the date of the Contracting Officer's final decision if, within the first ninety (90) days following the Contracting Officer's final decision, the Contractor has provided notice of an intent to file suit in an appropriate court; or

(iii) Until final disposition by the appropriate Board of Contract Appeals or court of competent jurisdiction, if the Contractor has:

(A) appealed to the Board of Contract Appeals or filed suit in an appropriate court within ninety (90) days; or

(B) submitted, within ninety (90) days, a notice of intent to file suit in an appropriate court and filed suit within one year.

(2) The Contractor agrees that the Government may strike, correct, or ignore the restrictive markings if the Contractor fails to—

(i) Appeal to a Board of Contract Appeals within ninety (90) days from the date of the Contracting Officer's final decision;

## Part I - The Schedule (Continued)

## Section H - Special Contract Requirements (Continued)

(ii) File suit in an appropriate court within ninety (90) days from such date; or

(iii) File suit within one year after the date of the Contracting Officer's final decision if the Contractor had provided notice of intent to file suit within ninety (90) days following the date of the Contracting Officer's final decision.

(3) The agency head, on a nondelegable basis, may determine that urgent or compelling circumstances do not permit awaiting the filing of suit in an appropriate court, or the rendering of a decision by a court of competent jurisdiction or Board of Contract Appeals. In that event, the agency head shall notify the Contractor of the urgent or compelling circumstances. Notwithstanding paragraph (h)(1) of this clause, the Contractor agrees that the agency may use, modify, reproduce, release, perform, display, or disclose computer software marked with (i) government purpose legends for any purpose, and authorize others to do so; or (ii) restricted or special license rights for government purposes only. The Government agrees not to release or disclose such software unless, prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at H- ??? of this contract Use and Non Disclosure Agreement or is a Government contractor receiving access to the software for performance of a Government contract that contains the clause that is substantially similar to DFARS [252.227-7025](#), Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends. The agency head's determination may be made at any time after the date of the Contracting Officer's final decision and shall not affect the Contractor's right to damages against the United States, or other relief provided by law, if its asserted restrictions are ultimately upheld.

(i) *Final disposition of appeal or suit.* If the Contractor appeals or files suit and if, upon final disposition of the appeal or suit, the Contracting Officer's decision is:

(1) Sustained—

(i) Any restrictive marking on such computer software shall be struck or corrected at the Contractor's expense or ignored; and

(ii) If the asserted restriction is found not to be substantially justified, the Contractor shall be liable to the Government for payment of the cost to the Government of reviewing the asserted restriction and the fees and other expenses (as defined in 28

## Part I - The Schedule (Continued)

## Section H - Special Contract Requirements (Continued)

U.S.C. 2412(d)(2)(A)) incurred by the Government in challenging the restriction, unless special circumstances would make such payment unjust.

(2) Not sustained—

(i) The Government shall be bound by the asserted restriction;  
and

(ii) If the challenge by the Government is found not to have been made in good faith, the Government shall be liable to the Contractor for payment of fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Contractor in defending the restriction.

(j) *Flowdown.* The Contractor shall insert this clause in all contracts, purchase orders, and other similar instruments with its subcontractors or suppliers, at any tier, who will be furnishing computer software to the Government in the performance of this contract. The clause may not be altered other than to identify the appropriate parties.

(End of clause)

**H-31 VALIDATION OF RESTRICTIVE MARKINGS ON TECHNICAL DATA**

(a) *Definitions.* The terms used in this clause are defined in the Rights in Technical Data—Noncommercial Items clause of this contract.

(b) *Presumption regarding development exclusively at private expense.*

(1) *Commercial items.* For commercially available off-the-shelf items (defined at 41 U.S.C. 104) in all cases, and for all other commercial items except as provided in paragraph (b) (2) of this clause, the Contracting Officer will presume that a Contractor's asserted use or release restrictions are justified on the basis that the item, component, or process was developed exclusively at private expense. The Contracting Officer shall not challenge such assertions unless the Contracting Officer has information that demonstrates that the item, component, or process was not developed exclusively at private expense.

(2) *Major systems.* The presumption of development exclusively at private expense does not apply to major systems or subsystems or components thereof, except for commercially available off-the-shelf items (which are governed by paragraph (b)(1)) of this clause. When the



Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

Contracting Officer challenges an asserted restriction regarding technical data for a major system or a subsystem or component thereof on the basis that the item, component, or process was not developed exclusively at private expense, the Contracting Officer will sustain the challenge unless information provided by the Contractor or subcontractor demonstrates that the item, component, or process was developed exclusively at private expense.

(c) *Justification.* The Contractor or subcontractor at any tier is responsible for maintaining records sufficient to justify the validity of its markings that impose restrictions on the Government and others to use, duplicate, or disclose technical data delivered or required to be delivered under the contract or subcontract. Except as provided in paragraph (b)(1) of this clause, the Contractor or subcontractor shall be prepared to furnish to the Contracting Officer a written justification for such restrictive markings in response to a challenge under paragraph (e) of this clause.

(d) *Prechallenge request for information.*

(1) The Contracting Officer may request the Contractor or subcontractor to furnish a written explanation for any restriction asserted by the Contractor or subcontractor on the right of the United States or others to use technical data. If, upon review of the explanation submitted, the Contracting Officer remains unable to ascertain the basis of the restrictive marking, the Contracting Officer may further request the Contractor or subcontractor to furnish additional information in the records of, or otherwise in the possession of or reasonably available to, the Contractor or subcontractor to justify the validity of any restrictive marking on technical data delivered or to be delivered under the contract or subcontract (e.g., a statement of facts accompanied with supporting documentation). The Contractor or subcontractor shall submit such written data as requested by the Contracting Officer within the time required or such longer period as may be mutually agreed.

(2) If the Contracting Officer, after reviewing the written data furnished pursuant to paragraph (d)(1) of this clause, or any other available information pertaining to the validity of a restrictive marking, determines that reasonable grounds exist to question the current validity of the marking and that continued adherence to the marking would make impracticable the subsequent competitive acquisition of the item, component, or process to which the technical data relates, the Contracting Officer shall follow the procedures in paragraph (e) of this clause.

## Part I - The Schedule (Continued)

## Section H - Special Contract Requirements (Continued)

(3) If the Contractor or subcontractor fails to respond to the Contracting Officer's request for information under paragraph (d)(1) of this clause, and the Contracting Officer determines that continued adherence to the marking would make impracticable the subsequent competitive acquisition of the item, component, or process to which the technical data relates, the Contracting Officer may challenge the validity of the marking as described in paragraph (e) of this clause.

(e) *Challenge.*

(1) Notwithstanding any provision of this contract concerning inspection and acceptance, if the Contracting Officer determines that a challenge to the restrictive marking is warranted, the Contracting Officer shall send a written challenge notice to the Contractor or subcontractor asserting the restrictive markings. Such challenge shall—

(i) State the specific grounds for challenging the asserted restriction;

(ii) Require a response within sixty (60) days justifying and providing sufficient evidence as to the current validity of the asserted restriction;

(iii) State that a U.S. Coast Guard Contracting Officer's final decision, issued pursuant to paragraph (g) of this clause, sustaining the validity of a restrictive marking identical to the asserted restriction, within the three-year period preceding the challenge, shall serve as justification for the asserted restriction if the validated restriction was asserted by the same Contractor or subcontractor (or any licensee of such Contractor or subcontractor) to which such notice is being provided; and

(iv) State that failure to respond to the challenge notice may result in issuance of a final decision pursuant to paragraph (f) of this clause.

(2) The Contracting Officer shall extend the time for response as appropriate if the Contractor or subcontractor submits a written request showing the need for additional time to prepare a response.

(3) The Contractor's or subcontractor's written response shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 7101), and shall be certified in the form prescribed at

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

33.207 of the Federal Acquisition Regulation, regardless of dollar amount.

(4) A Contractor or subcontractor receiving challenges to the same restrictive markings from more than one Contracting Officer shall notify each Contracting Officer of the existence of more than one challenge. The notice shall also state which Contracting Officer initiated the first in time unanswered challenge. The Contracting Officer initiating the first in time unanswered challenge after consultation with the Contractor or subcontractor and the other Contracting Officers, shall formulate and distribute a schedule for responding to each of the challenge notices to all interested parties. The schedule shall afford the Contractor or subcontractor an opportunity to respond to each challenge notice. All parties will be bound by this schedule.

(f) *Final decision when Contractor or subcontractor fails to respond.* Upon a failure of a Contractor or subcontractor to submit any response to the challenge notice the Contracting Officer will issue a final decision to the Contractor or subcontractor in accordance with paragraph (b) of this clause and the Disputes clause of this contract pertaining to the validity of the asserted restriction. This final decision shall be issued as soon as possible after the expiration of the time period of paragraph (e)(1)(ii) or (e)(2) of this clause. Following issuance of the final decision, the Contracting Officer will comply with the procedures in paragraphs (g)(2)(ii) through (iv) of this clause.

(g) *Final decision when Contractor or subcontractor responds.*

(1) If the Contracting Officer determines that the Contractor or subcontractor has justified the validity of the restrictive marking, the Contracting Officer shall issue a final decision to the Contractor or subcontractor sustaining the validity of the restrictive marking, and stating that the Government will continue to be bound by the restrictive marking. This final decision shall be issued within sixty (60) days after receipt of the Contractor's or subcontractor's response to the challenge notice, or within such longer period that the Contracting Officer has notified the Contractor or subcontractor that the Government will require. The notification of a longer period for issuance of a final decision will be made within sixty (60) days after receipt of the response to the challenge notice.

(2)(i) If the Contracting Officer determines that the validity of the restrictive marking is not justified, the Contracting Officer shall issue a final decision to the Contractor or subcontractor in accordance with the Disputes clause of this contract. Notwithstanding paragraph (e) of the

## Part I - The Schedule (Continued)

## Section H - Special Contract Requirements (Continued)

Disputes clause, the final decision shall be issued within sixty (60) days after receipt of the Contractor's or subcontractor's response to the challenge notice, or within such longer period that the Contracting Officer has notified the Contractor or subcontractor of the longer period that the Government will require. The notification of a longer period for issuance of a final decision will be made within sixty (60) days after receipt of the response to the challenge notice.

(ii) The Government agrees that it will continue to be bound by the restrictive marking for a period of ninety (90) days from the issuance of the Contracting Officer's final decision under paragraph (g)(2)(i) of this clause. The Contractor or subcontractor agrees that, if it intends to file suit in the United States Claims Court it will provide a notice of intent to file suit to the Contracting Officer within ninety (90) days from the issuance of the Contracting Officer's final decision under paragraph (g)(2)(i) of this clause. If the Contractor or subcontractor fails to appeal, file suit, or provide a notice of intent to file suit to the Contracting Officer within the ninety (90)-day period, the Government may cancel or ignore the restrictive markings, and the failure of the Contractor or subcontractor to take the required action constitutes agreement with such Government action.

(iii) The Government agrees that it will continue to be bound by the restrictive marking where a notice of intent to file suit in the United States Court of Federal Claims is provided to the Contracting Officer within ninety (90) days from the issuance of the final decision under paragraph (g)(2)(i) of this clause. The Government will no longer be bound, and the Contractor or subcontractor agrees that the Government may strike or ignore the restrictive markings, if the Contractor or subcontractor fails to file its suit within one (1) year after issuance of the final decision. Notwithstanding the foregoing, where the head of an agency determines, on a nondelegable basis, that urgent or compelling circumstances will not permit waiting for the filing of a suit in the United States Claims Court, the Contractor or subcontractor agrees that the agency may, following notice to the Contractor or subcontractor, authorize release or disclosure of the technical data. Such agency determination may be made at any time after issuance of the final decision and will not affect the Contractor's or subcontractor's right to damages against the United States where its restrictive markings are ultimately upheld or to pursue other relief, if any, as may be provided by law.

## Part I - The Schedule (Continued)

## Section H - Special Contract Requirements (Continued)

(iv) The Government agrees that it will be bound by the restrictive marking where an appeal or suit is filed pursuant to the Contract Disputes Act until final disposition by an agency Board of Contract Appeals or the United States Court of Federal Claims . Notwithstanding the foregoing, where the head of an agency determines, on a nondelegable basis, following notice to the Contractor that urgent or compelling circumstances will not permit awaiting the decision by such Board of Contract Appeals or the United States Claims Court, the Contractor or subcontractor agrees that the agency may authorize release or disclosure of the technical data. Such agency determination may be made at any time after issuance of the final decision and will not affect the Contractor's or subcontractor's right to damages against the United States where its restrictive markings are ultimately upheld or to pursue other relief, if any, as may be provided by law.

(h) *Final disposition of appeal or suit.*

(1) If the Contractor or subcontractor appeals or files suit and if, upon final disposition of the appeal or suit, the Contracting Officer's decision is sustained—

(i) The restrictive marking on the technical data shall be cancelled, corrected or ignored; and

(ii) If the restrictive marking is found not to be substantially justified, the Contractor or subcontractor, as appropriate, shall be liable to the Government for payment of the cost to the Government of reviewing the restrictive marking and the fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Government in challenging the marking, unless special circumstances would make such payment unjust.

(2) If the Contractor or subcontractor appeals or files suit and if, upon final disposition of the appeal or suit, the Contracting Officer's decision is not sustained—

(i) The Government shall continue to be bound by the restrictive marking; and

(ii) The Government shall be liable to the Contractor or subcontractor for payment of fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Contractor or

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)

subcontractor in defending the marking, if the challenge by the Government is found not to have been made in good faith.

(i) *Duration of right to challenge.* The Government may review the validity of any restriction on technical data, delivered or to be delivered under a contract, asserted by the Contractor or subcontractor. During the period within six (6) years of final payment on a contract or within six (6) years of delivery of the technical data to the Government, whichever is later, the Contracting Officer may review and make a written determination to challenge the restriction. The Government may challenge a use or release restriction asserted with respect to technical data by a contractor or subcontractor at any tier under a contract subject to this section if the Contracting Officer finds that—

- (A) reasonable grounds exist to question the current validity of the asserted restriction; and
- (B) the continued adherence by the United States to the asserted restriction would make it impracticable to procure the item to which the technical data pertain competitively at a later time.

The Government may, however, challenge a restriction on the release, disclosure or use of technical data at any time if such technical data—

- (1) Is publicly available;
  - (2) Has been furnished to the United States without restriction;
  - (3) Has been otherwise made available without restriction. Only the Contracting Officer's final decision resolving a formal challenge by sustaining the validity of a restrictive marking constitutes “validation” as addressed in 10 U.S.C. 2321, or
  - (4) Has been the subject of a fraudulently asserted use or release restriction.
- (j) *Decision not to challenge.* A decision by the Government or a determination by the Contracting Officer, to not challenge the restrictive marking or asserted restriction shall not constitute “validation.”
- (k) *Privity of contract.* The Contractor or subcontractor agrees that the Contracting Officer may transact matters under this clause directly with subcontractors at any tier that assert restrictive markings. However, this clause neither creates nor implies privity of contract between the Government and subcontractors.
- (l) *Flowdown.* The Contractor or subcontractor agrees to insert this clause in contractual instruments with its subcontractors or suppliers at any tier requiring the delivery of technical data.

Part I - The Schedule (Continued)  
Section H - Special Contract Requirements (Continued)  
(End of clause)

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